NOTES AND COMMENTS

PRIVATE GOVERNMENT ON THE CAMPUS—JUDICIAL REVIEW OF UNIVERSITY EXPULSIONS*

> The courts have consistently upheld the validity of regulations that have the effect of reserving to the college the right to dismiss students at any time for any reason without divulging the reason other than its being for the general good of the institution. . . . [T]he prevailing law does not require the presentation of formal charges or a hearing prior to expulsion by the school authorities.

U.S. District Court, Middle District of Alabama, 1960.[1]

> [O]ur sense of justice should be outraged by the denial to students of the normal safeguards. . . . [It is] shocking to find that a court supports . . . [the college] in denying to a student the protection given to a pickpocket.

U.S. Court of Appeals, Fifth Circuit, 1961.[2]

INTRODUCTION

The rights of students to freedom and justice, and the authority of universities to discipline at their discretion, have recently been disputed in a number of significant cases involving student expulsion.[3] In these cases, students, vis-à-vis their schools, have claimed rights both to due process, including fair warning of rules and fair hearing on specific charges, and to substantive rights, such as freedom of speech, assembly, and religion. The universities have claimed authority to make disciplinary rules and to adopt procedures for expulsion at their discretion. Expulsion is the disciplinary sanction most likely to be brought before the courts; suits for reinstatement may challenge both the procedure imposing the sanction, and the regulation for breach of which it was imposed, seeking civil rights injunctions or other remedies.

While investigation of the law of student discipline as a whole and as an instance of the law of private governments is merited, this Comment will be

---

*This Comment was made possible in part through the assistance of the Academic Freedom Project of the United States National Student Association.

1. Dixon v. Alabama State Bd. of Educ., 186 F. Supp. 945, 951-52 (M.D. Ala. 1960), *rev'd*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

2. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961), *reversing* 186 F. Supp. 945 (M.D. Ala. 1960), quoting Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957).

3. Carr v. St. John's Univ., 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *reversing* 34 Misc. 2d 319, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 235 N.Y.S.2d 834 (1962) (civil marriage); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *reversing* 186 F. Supp. 945 (M.D. Ala. 1960), *cert. denied*, 368 U.S. 930 (1961) (sit-in demonstration); Knight v. State Bd. of Educ., 200 F. Supp. 174, 176 (M.D. Tenn. 1961) (sit-in demonstration); Lessin v. Regents of the Univ. of Cal., Superior Ct., Riverside Co. (unreported) (1962), see Record No. 7162, 4th App. Dist. Cal. (Communist speakers).

directed primarily to problems of expulsion—the complete breach of the student-school relationship—at the college and university level. This Comment centers on expulsions arising from regulation of student behavior; it assumes a common law jurisdiction. The analysis may be susceptible of extrapolation to meet other, related, problems, such as discipline generally, or expulsion at pre-college levels. Problems of faculty rights and problems of admission will not be dealt with. In formulating minimum standards for judicial review of expulsions from schools, whether state-run or private, graduate or undergraduate, the conflicting goals of school autonomy, procedural fairness, and the freedom of students as citizens will be weighed.

Concern with expulsion is merited primarily because of the effect of the sanction and its threat to the students enrolled at institutions of higher learning in the United States.[4] Had the body of student regulations been imposed upon these students as citizens by force of public law rather than as students by university authority, courts predictably would have invoked basic constitutional rights to require fairer enforcement procedures, or to strike many of the rules down. The implied thesis of student suits is that their rights as citizens to justice before punishment and to personal freedom are infringed equally by school or state, whichever punishes without a fair hearing,[5] or restricts their exercise of speech,[6] or forbids them to marry in a civil ceremony.[7] Such regula-

4. The October, 1961 total for all school enrollment was 47,708,000. 1963 WORLD ALMANAC 541. The 1961 enrollment in institutions of higher education was 3,891,000. *Id.* at 539.

5. A well-considered Fifth Circuit case involves expulsion of Negro students without hearings by an Alabama state college for participating in sit-in demonstrations. The U.S. District Court held that students have no procedural or substantive rights, as long as a school acts without malice in expelling them. The Court of Appeals reversed, holding that state colleges—like all other governmental bodies—were constitutionally required to provide procedural due process when inflicting deprivations; the court spelled out the due process requirements for schools. Dixon v. Alabama State Bd. of Educ., 186 F. Supp. 945 (M.D. Ala. 1960), *rev'd*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

In a case growing out of similar demonstrations a Tennessee Board of Education regulation required the dismissal of any student arrested and convicted on charges "involving personal misconduct." Knight v. State Bd. of Educ., 200 F. Supp. 174, 176 (M.D. Tenn. 1961). Negro students convicted on charges growing out of a sit-in demonstration were suspended without notice after an *ex parte* hearing. The District Court substituted its interpretation of the school rule for that of the school and held that the civil rights nature of the offenses precluded any automatic assumption that personal misconduct was involved. The Court required that a hearing with prior notice be held before students be expelled. Opinion was reserved on any possible substantive bar against expulsion for participation in a sit-in demonstration. *Knight, supra. Cf.* the actions of Chief Judge Tuttle of the Fifth Circuit in granting a temporary restraining order reinstating Birmingham public school pupils who had been suspended without hearing after they had absented themselves from school, and had been arrested, in connection with civil rights demonstrations. N.Y. Times, May 23, 1963, p. 1, col. 7.

6. Steier, a student at Brooklyn College, had conducted a continuing campaign alleging that the public college's supervision of student activities was tyrannical; consequently, he was expelled. In a suit for relief under the Civil Rights Act, Steier claimed that his rights to due process, equal protection, and free speech had been infringed. The judge writing "the

tions in themselves injure student interests; their enforcement against any individual violator imposes a special deprivation upon him. Discipline is the criminal law of university government.[8] When expulsion is imposed as the punishment, the student suffers the loss of a status and the destruction of a set of relationships which have unique intrinsic worth.[9] If the expulsion is made

opinion of the court" stated that "the United States District Court lacked jurisdiction over this matter . . . [because] education is a field of life reserved to the individual states. The only restriction the Federal Government imposes is that in the educational program no state may discriminate against an individual because of race, color, or creed." Steier v. New York State Educ. Comm'r, 271 F.2d 13, 18 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960). (Although this opinion is labelled that of "the court," each of the other two judges on the panel held that there was jurisdiction, and thus, as precedent, this case stands for the existence of federal jurisdiction to review state college expulsions. As then Chief Judge Clark's dissent notes, "This indeed is a novel doctrine. No court, ever before to my knowledge, has suggested [this] . . . ." *Id.* at 23.). The second judge, concurring, found the due process and equal protection claims not valid on the facts, and stated that Steier's free speech had not been infringed, because he remained free to denounce the Brooklyn College administration; only his right to attend the college had been taken away. Only the dissenting then Chief Judge, Charles Clark, found the complaint to state a valid cause of action.

See, in support of this dissent, West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (the second flag salute case) wherein the Supreme Court clearly held that state schools might not expel students for exercising their freedom of expression under the first amendment. See also Hamilton v. Regents, 293 U.S. 245 (1934) (compulsory ROTC); Brown v. Board of Educ., 347 U.S. 483 (1954); and Swan v. Board of Higher Educ., Doc. No. 27996 at p. 2239 (2d Cir. June 4, 1963) (limiting *Steier*) (*semble*).

7. A senior at St. John's University and a student who had finished all courses and was awaiting his degree were expelled from the university for getting married before a city clerk, instead of a Catholic priest. The two witnesses, both seniors, were also expelled. All the students were Roman Catholic; St. John's University is conducted by a Roman Catholic teaching order, but admits students of all religions and has not filed with the State Commissioner of Education a statutory certificate that it is a religious institution. No specific school rule prohibits civil marriages, but the catalog reserves discretionary right to expel, in the name of "Christian education." See clause quoted at note 77 *infra*.

In a suit brought by three of the students for a statutory writ commanding readmission, it was claimed that their freedom of religion and their rights to due process and fair warning had been infringed. The trial court granted the writ on the second ground, but was reversed by divided votes in the Appellate Division and the Court of Appeals. Carr v. St. John's Univ., *supra* note 3.

8. See discussion at text, notes 151-52 *infra*.

9. [C]ertain of these diplomas are evidences of qualification for certain pursuits in life. . . . The relationship created amounts to this and more; it means the establishment of associations, the acquisition of friendships, the enjoyment of experiences which become endowments of great value to the student in subsequent life—values which are very great and which cannot be measured in dollars. The selection of one's institution of learning is always a matter of deep consideration and care on the part of the parents and of the youth; it is usually made with regard to the prospective student's career in life; once made and followed by long attendance, it cannot without serious loss be changed, and dismissal is pregnant with consequences which may spell the ruination of a life.

Anthony v. Syracuse Univ., 130 Misc. 249, 253, 223 N.Y. Supp. 796, 802 (1927), *rev'd*, 224 App. Div. 487, 231 N.Y. Supp. 435 (1928).

known to be "for cause," the imputation of grave deficiencies defames the student. Like the convicted criminal, the student may find that the stigma of his punishment follows him through life. By its phrasing of the notation of separation made on the student's transcript, the school can render it impossible for the student to continue his education elsewhere,[10] denying him the university degree which has become the emblem of education expected of an ever-widening class and the prerequisite for an ever-increasing number of occupations. Non-academic expulsion from graduate or professional schools is in many ways the equivalent of a license revocation proceeding; as a result of the school's punitive action, the door to a profession is permanently closed. Although he retains what knowledge he has acquired, the expelled student, after having extended effort, time and money in his studies, loses both what he has invested towards a degree and its future value;[11] the result may be a substantial diminution of his future earning power.[12]

Expulsion is not only a severe deprivation, it may also be an arbitrary one.[13] Although universities imposing the sanction often do so with care commensurate to its seriousness, expulsions are occasionally inflicted either without fair procedure or to enforce rules infringing the citizen's basic rights. For example, Syracuse University expelled Miss Anthony, a senior, after a university

10. See Jacobson, *The Expulsion of Students and Due Process of Law—The Right to Judicial Review*, 34 J. HIGHER ED. 250, 253-55 (1963).

11. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (1961); *accord*, Knight v. State Bd. of Educ., 200 F. Supp. 174, 178 (M.D. Tenn. 1961).

12. As of 1958 the average lifetime income of a male high-school graduate over 25 years old was $241,844; of someone with from one to three years of college, $305,395; of a college graduate, $419,871. 1962 STATISTICAL ABSTRACT OF THE U.S. 119.

13. Responses from seventy-two state universities reporting on their own disciplinary procedures acknowledge the following departures from what is ordinarily provided even for petty criminal offenders:

1. Forty-three per cent do not provide students with a reasonably clear and specific list which describes misconduct subject to discipline;

2. Fifty-three per cent do not provide students with a written statement specifying the nature of the particular misconduct charged, and only seventeen per cent provide such a statement at least ten days before determination of guilt or imposition of punishment;

3. Sixteen per cent do not even provide for a hearing in cases where the student takes exception to the charge of misconduct or to the penalty imposed;

4. Forty-seven per cent allow students or administrators who appear as witnesses or who bring the charge, to sit on the hearing board if they are otherwise a member;

5. Thirty per cent do not allow the student charged to be accompanied by an adviser of his choice during the hearing;

6. Twenty-six per cent do not permit the student charged to question informants or witnesses whose statements may be considered by the hearing board in determining guilt; and even including those colleges which normally allow some cross-examination, eighty-five per cent permit the hearing board to consider statements by witnesses not available for cross-examination;

7. Forty-seven per cent permit the hearing board to consider evidence which was "improperly" acquired (*e.g.*, removed by a university employee during a

official had spoken to her sorority sisters and concluded that she was not "a typical Syracuse girl." The school would state no specific grounds for the expulsion, relying on a clause in its catalogue which stated:

> Attendance at the University is a privilege and not a right. In order to safeguard those ideals of scholarship and that moral atmosphere which are in the very purpose of its founding and maintenance, the University reserves the right and the student concedes to the University the right to require the withdrawal of any student at any time for any reason deemed sufficient to it, and no reason for requiring such withdrawal need be given.[14]

Attempts to curb student political activity are sometimes masked by an assertion that the university has a privilege to be arbitrary. The University of California, for example, along with many other colleges, has enacted a rule limiting student prerogatives of speech and assembly by prohibiting students from inviting Communists to speak at on-campus meetings, even if satisfactory arrangements are made for policing, scheduling, and exclusion of non-students.[15] The rule was adopted by University officials despite an earlier state supreme court decision holding invalid, on first amendment principles, similar limitations on meetings held by civic groups in public school buildings.[16] Yet, in this case as well as Miss Anthony's, the court upheld the school's asserted right to act.

Courts have long acknowledged jurisdiction over suits challenging expulsion of students from universities.[17] But, rather than attempting to delineate the proper scope and standards for judicial review, the courts have stated their resolution of these conflicting interests in terms of the conclusory categories and ambiguous norms of a formless body of case-law. After setting forth these categories and norms, and demonstrating the unusual freedom which they allow the courts, the Comment will analyze the institutions and events necessarily involved, in an attempt to evolve a coherent approach for courts to take.

---

search of a student's room in the absence of some emergency justifying such a procedure.

Van Alstyne, *Procedural Due Process and State University Students*, 10 U.C.L.A.L. REV. 368, 368-69 (1963). See ACLU, *infra* note 184, at 10-11. Compare UNITED STATES NATIONAL STUDENT ASSOCIATION, CAMPUS JUSTICE (n-d.). See notes 164, 165 *infra*.

14. See Anthony v. Syracuse Univ., 224 App. Div. 487, 489, 231 N.Y. Supp. 435, 438 (1928), *reversing* 130 Misc. 249, 223 N.Y. Supp. 796 (1927).

15. Petition for writ of mandate to school officials preventing enforcement of the rule denied, without opinion. Lessin v. Regents of the Univ. of Cal., Superior Ct., Riverside Co. (unreported) (1962), see Record No. 7162, 4th App. Dist. Cal. See N.Y. Times, May 11, 1963, p. 13, col. 2. The university has since rescinded its rule. N.Y. Times, June 22, 1963, p. 25, col. 5.

16. Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536 (1946).

17. See Commonwealth *ex rel.* Hill v. McCauley, 2 Pa. County Ct. 459 (1886), 3 Pa. County Ct. 77 (1887); People *ex rel.* Cecil v. Bellevue Hosp. Medical College, 60 Hun. 107, 14 N.Y.S. 490 (Sup. Ct.), *aff'd mem.*, 128 N.Y. 621 (1891); Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909); see also Annot. 39 A.L.R. 1019 (1925); Annot., 50 A.L.R. 1497 (1927); Annot. 58 A.L.R. 2d 903 (1958).

PART I
THE LAW OF STUDENT DISCIPLINE

Courts can be called upon to decide the propriety of college expulsions in suits for reinstatement through mandamus, specific performance, statutory decree, declaratory judgment, or injunction under the civil rights statutes, and in actions for damages sounding in contract or tort.[18]

Although acknowledging their jurisdiction, however, courts have seemed unwilling to create that set of standards necessary to solve the problems of discipline suits.[19] This reluctance is reflected in the rarity with which student suits prevail. The courts assign such reasons for it as the supposed undermining of school authority that outside review would cause, the expected great number and small importance of student complaints, the relative advantage of schools over courts in appraising a student's overall conduct, and the delicacy of the matters considered.[20] But the most important explanation given by the courts for this reluctance effectively to review the colleges' decisions is hardly separable from the basic reason for allowing those decisions to be made by the college initially—an acknowledgment that the college's discretion in these matters has been established by age-old custom.[21] In recognizing the "discretion" customary to colleges, however, the courts rarely distinguish between the principle that the college may make its decision without fixed rules, and the principle that courts will allow great latitude to the college's decision on review.

Sources of School Authority

Several legal theories compete for acceptance as explanations of the source of college authority to discipline students; each theory suggests built-in limitations on college power which may have important influence on the scope of judicial review. That the teacher stands in place of the parent—*in loco parentis*—with the same power to control and punish, is one of the oldest and most

18. See, *e.g.*, People *ex rel.* Cecil v. Bellevue Hosp. Medical College, *supra* note 17; see also Harker, *The Use of Mandamus to Compel Educational Institutions to Confer Degrees*, 20 YALE L.J. 341 (1911); Pennypacker, *Mandamus to Restore Academic Privileges*, 12 VA. L. REV. 645 (1926). Annot., 39 A.L.R. 1019 (1925); Barker v. Bryn Mawr College, 278 Pa. 121, 122 Atl. 220 (1923) (specific performance); Carr v. St. John's Univ., 34 Misc. 2d 319, 231 N.Y.S.2d 403, *rev'd*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 235 N.Y.S.2d 834 (1962) (statutory writ); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961) (review under the statutory provision for civil rights suits, 28 U.S.C. §§ 1331, 1343 (1958)); Miami Military Institute v. Leff, 129 Misc. 481, 220 N.Y. Supp. 799 (1962) (contract damages); John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924) (tort).

19. "The usual qualification that dismissal must not be arbitrary, in bad faith, or in abuse of discretion remains largely undefined." Note, 35 COLUM. L. REV. 898, 899 (1935).

20. See, *e.g.*, Woods v. Simpson, 126 Atl. 882, 146 Md. 547 (1924). Steier v. New York State Commissioner of Educ., 271 F.2d 13, 18 (1959), *cert. denied*, 361 U.S. 966 (1960).

21. See, *e.g.*, John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924) ("common law of schools"); Goldstein v. New York Univ., 76 App. Div. 80, 78 N.Y. Supp. 739 (1902) ("inherent" power).

common explanations of disciplinary authority.[22] Much of the court experience with school punishment developed in connection with criminal prosecution and tort damage actions against schoolmasters for physical punishment of children. The teacher, originally conceived of as exercising authority through parental delegation,[23] came to be thought of as a parental analogue, with "inherent" powers arising out of the similarity of the teacher's role to the parent's.[24] The *in loco parentis* concept is used by courts today to state the prerogatives of the institution, as well as the teacher; the university, as well as the primary school. It involves expulsion, as well as physical punishment; reinstatement, as well as damages. "College authorities stand *in loco parentis* [concerning pupils] and . . . may make any rule or regulation for the government, or betterment of their pupils that a parent could for the same purpose."[25]

Shading off from the *in loco parentis* analogy, some decisions are phrased in terms of inherent needs of the teacher's functional role, rather than inherent similarities to parental roles.[26] The teacher's special competence, or his purposes, or his necessary concern as teacher with the pupil behavior regulated, are used to define the teacher's power to discipline.[27] The foundation of the

22. Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903) (recognizing rule); see also cases collected at 43 A.L.R.2d at 472-73 (1955).

23. 1 BLACKSTONE, COMMENTARIES *453; 2 KENT, COMMENTARIES 170 (1826); Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941) (express delegation of authority by letter to school).

24. See, *e.g.*, State v. Pendergrass, 19 N.C. 365 (1837) ("analogous" authority); State *ex rel.* Burpee v. Burton, 45 Wis. 150, 155-57 (1878). The Wisconsin court, in an assault and battery action against a teacher, held that the teacher stands for the time being *in loco parentis* to his pupils because of his position, and that "to enable him to discharge [his] duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands." *Id.* at 156.

According to the Restatement, the *in loco parentis* power of private schools is delegated, and the school "as the delegate of the parent is not privileged to inflict a punishment which the parent has forbidden or to punish a child for doing or refusing to do what the parent has directed the child to do or not to do." 1 RESTATEMENT, TORTS § 153(1) (1934). *But cf.* Curry v. Lasell Seminary, 168 Mass. 7, 46 N.E. 110 (1897) (Parents wished 20 year-old daughter to visit home Sundays notwithstanding school rules; *held*, if parents won't agree to reasonable school rules, exclusion of student is proper). As to public schools and colleges, even though attendance is voluntary, the Restatement takes the position that the *in loco parentis* power is analogous to the parental in having its foundation in recognition by the law, independent of parental instructions. *Id.* at § 153(2).

25. John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924), an action against a college president for tort damages resulting from expulsion, in which the court adopts the *Burton* doctrine (*supra* note 24).

Although Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913) is often cited as authority for the existence of *in loco parentis* authority in the college, the doctrine of the case is limited by its facts. The students at *Berea* were found to be country-folk unused even to small town living, and thus needing special guidance; moreover, the specific rule in question, prohibiting eating at local restaurants, was held justified by the health hazard thought to exist.

26. Woods v. Simpson, 126 Atl. 882, 146 Md. 547 (1924).

27. See, *e.g.*, Landers v. Seaver, 32 Vt. 114 (1859).

special status is sometimes discovered by courts in a long standing custom of schools.[28] And this custom may be thought to be institutionalized in the common statutory charter grants to colleges of power "to make and establish such Ordinances, Orders and Laws as may tend to the good and wholesome government of the said College & all the Students.[29]

An implied contract theory has also been used to define the teacher-student relation,[30] where the customary school authority has been said to be incorporated into the terms of the student's enrollment. Thus, even though the relationship of the parties be determined in fact by their participation in a preestablished social pattern, most courts prefer to state their rights and duties *inter sese* in contractual terms.[31] When school catalogs or other specific documents exist, the courts generally take them to constitute express contractual terms supplementing the implied contract and other sources of disciplinary authority.[32] College catalogs generally contain a waiver clause reserving to the University a discretionary right to expel—as one school puts it, "at any time, for any reason deemed sufficient to it, and no reason for requiring such withdrawal need be given."[33] The presence of such clauses enables the court to

28. *Ibid.*; John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924).

29. The charter of *Dartmouth College*, reprinted in ELLIOTT, CHARTERS AND BASIC LAWS OF SELECTED AMERICAN UNIVERSITIES AND COLLEGES 185 (1934); see also, *e.g.*, *Duke University*, "to make such rules, regulations, and by-laws not inconsistent with the Constitutions of the United States and of this State, as may be necessary for the good government of said University." *Id.* at 191. *Colby College*, "to make and ordain, as occasion may require, reasonable rules, orders and by-laws, not repugnant to the laws of this Commonwealth, with reasonable penalties for the good government of said Institution." *Id.* at 126. *Princeton University*, "to have the immediate care of the education and government of such students." *Id.* at 427. *Yale University*, "the Government . . . of the said College . . . and shall have Power . . . to make, ordain and establish all such wholesome and reasonable Laws, Rules, and Ordinances, not Repugnant to the [public laws] as they shall think fit and proper for . . . Ordering, Governing, Ruling, and Managing the said college . . . which shall be laid before this [state] Assembly as often as Required, and may also be Repealed or Disallowed by this [state] assembly when they shall think proper. *Id.* at 591-92.

30. In return for the student's reliance in money and time, the school is said to have promised to allow him to continue for the entire course of study, and to award him a degree, conditional on the student's having conformed to reasonable rules reasonably enforced, to the imposition of which the student is held to have impliedly "consented." Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909); People *ex rel.* Cecil v. Bellevue Hosp. Medical College, 60 Hun. 107, 14 N.Y. Supp. 490 (Sup. Ct. 1891).

31. "Almost invariably the courts regard the situation as one of contract between the student and university." Note, 35 COLUM. L. REV. 898, 899 (1935). But the same cases employing contract terminology, will speak also in terms of status, whether *in loco parentis*, inherent authority of schools, or both. Many commentators regard the school-student relationship as essentially one of status, rather than contract, and regard an action for improper expulsion as one for breach of the relationship itself, sounding in tort. See, *e.g.*, *ibid.*; Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1007 (1930); Note, 37 N.Y.U.L. REV. 1164 (1962); *cf.* Cowan, *Interference with Academic Freedom: The Pre-Natal History of a Tort*, 4 WAYNE L. REV. 205 (1958). *Compare* Summers, *The Law of Union Discipline: What the Courts do in Fact*, 70 YALE L.J. 175 (1960).

32. De Haan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957).

33. Anthony v. Syracuse Univ., 224 App. Div. 487, 489, 231 N.Y. Supp. 435, 438 (1928).

construe terms, rather than construct them, in order to express the relation it deems to exist.[34] In sum, school authority may be verbalized as arising from the following sources: express delegation of the authority of the parental status; delegation of the authority of the parental status implied from similar roles; functional needs of schools; customary powers of schools; legislation or charter; implied contract between student and school; express contract between student and school.

Sources of Limits on School Authority

The authority to expel, however, is not considered to be plenary, no matter what its source. Doctrinal limitations upon the school's authority to expel are found in a range of legal theories, including those which explain the sources of school power. Although cases enforcing these limitations are relatively few, their well-settled nature is reflected in their consistent prominence as *dicta* in cases holding for defendant schools. The basic rule, that there is no right to expel arbitrarily, was established by a nineteenth century holding of the New York Court of Appeals. Where a medical student was excluded from final exams after finishing his course, the court employed a theory of implied contract for education:

> When there is an absolute and arbitrary refusal there is no exercise of discretion. It is nothing but a wilful violation of the duties which they have assumed. Such a position could never receive the sanction of a court in which even the semblance of justice was attempted to be administered[35]

In a Michigan Supreme Court case of the same generation, a similar implied contract theory was used in reaching the conclusion that even students who had not yet completed their course had a right to be protected from arbitrary expulsion. Moreover, the fact that reasons were stated would not exculpate the university from a charge of arbitrariness, and the propriety of the grounds for expulsion—in this case the students' race—could be evaluated by the Court.[36]

When the implied contractual terms of the student-school relationship are supplemented by specific documents, the contract analysis is no less a source of limits to the school's authority. Courts have rejected interpretations of the contract authorizing an absolute power to expel, in situations where catalog waiver clauses reserved the right to expel only for specific reasons; they have indicated instead that expulsion may then be only for the specified reasons.[37] In practice, however, if the purposes stated in the catalog clause are broad, the

34. The Judge's freedom is as great in the one case as in the other. See, *e.g.*, Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

35. People *ex rel.* Cecil v. Bellevue Hosp. Medical College, 60 Hun. 107, 14 N.Y. Supp. 490 (Sup. Ct. 1891). *Cf.* note 37 *infra* and text.

36. Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909) (*dictum*).

37. See Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y. Supp. 435 (1928); Carr v. St. John's Univ., 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *reversing* 34 Misc. 2d 319, 231 N.Y.S.2d 403, *aff'd mem.*, 12 N.Y.2d 802, 235 N.Y.S.2d 834 (1962).

actual restriction imposed on the exercise of authority by this doctrine is slight.[38]

Where courts use status rather than contract relationship as a source of authority, they also find, built in to the doctrine, limitations upon its exercise. Although these limitations arose in the schoolmaster-pupil context, in connection with doctrines of authority, they seem, unlike the doctrines of authority,[39] to have been articulated only in the schoolmaster-pupil context. Where it is the court's conception that the schoolmaster derives his authority *in loco parentis* from parental delegation or from analogy, the incompleteness of that analogy or agency relationship has been drawn upon to restrict the motives for punishment, the extent of punishment, the type of pupil behavior regulable, and the mode of administration of punishment. The only motive for punishment held proper is regard for the welfare of the child punished—or, more broadly, for the welfare of the children of the school.[40] Painful punishment is authorized by the law only when it is in the best interests of the child; therefore any punishment causing lasting physical damage is forbidden.[41] Even a lesser quantum of punishment may be improper, depending on the child's age, sex, or size.[42] The court must also consider whether the offense committed justified the amount of punishment inflicted.[43] Courts would require that the

38. See cases cited note 37 *supra*. De Haan v. Brandeis Univ., 150 F. Supp. 626, 627 (D. Mass. 1957), where a catalog clause reserved to the school ". . . the right to sever the connection of any student with the university for appropriate reason." "The problem of what constitutes an appropriate reason," the court held, "must clearly be left to [the school] authorities. . . ." Using such reasoning, the court denied reinstatement to an expelled graduate student who had protested the inadequacy of his scholarship. For criticism of this case see Comment, 10 STAN. L. REV. 746 (1958).

39. Notes 22-25 *supra*.

40. State v. Pendergrass, 19 N.C. 365, 367 (1837); State v. Vanderbilt, 116 Ind. 11, 18 N.E. 266 (1888). See also 1 RESTATEMENT, TORTS § 151 (1934) on purpose of punishment. Cases collected in Annot. 43 A.L.R.2d at 471, 483 (1955).

41. Any "permanent injury," "permanent ill" or "lasting mischief" is considered impermissible "as not only being unnecessary for but inconsistent with, the purpose for which correction is authorized." State v. Pendergrass, 19 N.C. 365, 366 (1837); Boyd v. State, 88 Ala. 169, 7 So. 268 (1890).

"The privilege to punish a child is given for the benefit of the child and for the purpose of securing his proper education and training. A punishment which does serious or permanent harm to the child or which is of such character as to injure his self-respect is obviously detrimental and not beneficial to his future." 1 RESTATEMENT, TORTS § 149, comment (a) (1934).

42. Fertich v. Michener, 111 Ind. 472, 11 N.E. 605, 14 N.E. 68 (1887); Sheehan v. Sturges, 53 Conn. 481, 2 Atl. 841 (1885).

> In determining whether a punishment is excessive, the nature of the offense, the apparent motive of the offender, the influence of his example upon other children of the same family or group, the sex, age, and physical and mental condition of the child, are factors to be considered.

1 RESTATEMENT, TORTS § 150 (1934).

See also cases collected in Annot. 43 A.L.R.2d 471, 483 (1955).

43. Lander v. Seaver, 32 Vt. 114 (1859); 1 RESTATEMENT, TORTS § 150 (1934); see also cases collected in Annot. 43 A.L.R.2d 471, 479-82 (1955).

scope of extra-classroom behavior regulated be limited to conduct germane to the classroom. Some, indeed, insist that the relation be direct and immediate.[44] And punishment of a child without his knowing why has been held to be impermissible.[45] Finally, courts exercise a general supervisory power over *in loco parentis* authority by imposing the additional standard of "reasonableness" on all rules and punishments.[46]

Limitations may be more readily recognized by courts where, as in the case of the professional or graduate student, the likely harm of expulsion is relatively specific. Thus, a distinction possibly present, but not articulated in the case-law, is that between graduate and undergraduate students. Graduate students are involved in a disproportionate number of cases, and seemingly receive favorable treatment in a greater proportion of claims. An unusual proportion of the early college discipline cases involve professional school students;[47] the earliest school segregation cases to be decided favorably to students' constitutional rights involved graduate and professional students.[48] There are several possible explanations: graduate students may be more conscious of their rights and better able to litigate to defend them. Or, graduate students may face a greater and more certain deprivation in being excluded and, therefore, be more highly motivated in the assertion of their rights. Through these considerations, the courts may have been led to provide more intensive review.

That a student's constitutional rights are any limitation on his private college has not been established by any modern holding.[49] But the *Flag Salute Cases,* striking down state school requirements infringing freedom of belief, include students at state schools, at least, among those protected by the First

44. State *ex rel.* Dresser v. District Bd., 135 Wis. 619, 116 N.W. 232 (1908); Lander v. Seaver, 32 Vt. 114 (1859); O'Rourke v. Walker, 102 Conn. 130, 128 Atl. 25 (1925); Deskins v. Gose, 85 Mo. 485 (1885). *Cf.* the Restatement rule that the privilege of using reasonable force exists "only insofar as the privilege is necessary for the education" of the child. 1 RESTATEMENT, TORTS § 152 (1934).

45. State v. Mizner, 50 Iowa 145 (1878).

46. "A . . . teacher . . . is not liable, either civilly or criminally, for moderately correcting a . . . pupil . . . but it is otherwise if the correction is immoderate and unreasonable . . . . [citing several treatises] In fact, this rule seems to be universally recognized by the courts of this country." Clasen v. Pruhs, 69 Neb. 278, 283, 95 N.W. 640, 642 (1903). See also cases collected at 79 C.J.S., *Schools and School Districts* §§ 494(d), 501, 503(b); 47 AM. JUR., *Schools,* §§ 175, 181; Annot. 43 A.L.R.2d 471, 472-73 (1955).

47. See People *ex rel.* Cecil v. Bellevue Hosp. Medical College, 60 Hun. 107, 14 N.Y. Supp. (Sup. Ct. 1891) (medical student); Baltimore Univ. v. Colton, 98 Md. 623, 57 Atl. 14 (1904); Goldstein v. New York Univ., 76 App. Div. 80, 78 N.Y. Supp. 739 (1902) (law students).

48. Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (Univ. of Mo.); Sipuel v. Board of Regents, 332 U.S. 631 (1948) (Univ. of Okla.); Sweatt v. Painter, 339 U.S. 629 (1950) (Univ. of Tex.); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (Univ. of Okla.). The first three cases involve admission to law schools, the fourth, the racially discriminatory rules of a graduate school.

49. But it has been suggested that the provisions common to statutes, Charter, and the case law, that no school rule may be "inconsistent with law" be "construed to assure the preservation of fundamental liberties." Note, 35 COLUM. L. REV. 898, 901 n.19 (1935). See

Amendment.[50] Also, even before the *School Segregation Cases* established the rights of students to racial non-discrimination,[51] the Supreme Court had held that a state university's disciplinary authority over students already admitted was limited by the constitutional standard of equal protection.[52] And, in *Dixon v. Alabama State Board of Education,* involving expulsion of Negro students by state colleges for participation in sit-ins, the Fifth Circuit held that state colleges, like all other governmental bodies, were constitutionally required to observe due process when inflicting deprivations.[53] These holdings establish the principle that the disciplinary authority of state colleges is not solely a matter of the discretion of officials but is limited by the constitutional rights of the students.[54]

Several courts have recognized that there are procedural, as well as substantive, limitations on the school's power to sever the student-school relationship. At one extreme is the "no hearing" doctrine:[55] that a school need not inform the student of the evidence against him[56] or allow him an opportunity to present a defense[57]—indeed, that a school need not specify on what charges the student is being expelled.[58] Other cases suggest an "informal hearing"

N.Y. EDUCATION LAW § 68(10) (1909); see generally BARTLETT, *op. cit. supra* note 16; *cf.* Miami Military Institute v. Leff, 129 Misc. 481, 220 N.Y. Supp. 799 (1926); Anthony v. Syracuse Univ., 130 Misc. 249, 223 N.Y. Supp. 796, *rev'd*, 224 App. Div. 487, 231 N.Y. Supp. 435 (1928). There also seems to be implicit authority for the exercise of judicial review.

50. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), *overruling* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940). *Cf.* Hamilton v. Regents, 293 U.S. 245 (1934) (recognized federal court jurisdiction over claims that state college rules were constitutionally invalid, but sustained compulsory ROTC at state colleges against the claim for exemption of conscientious objectors, as a form of draft).

51. Brown v. Board of Educ., 347 U.S. 483 (1954).

52. See McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

53. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *accord*, Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).

54. *But see* Steier v. New York Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960). *Supra* note 6.

55. Expulsion without any hearing was sustained in several cases; John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); De Haan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957); Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y. Supp. 435 (1928); Barker v. Bryn Mawr College, 278 Pa. 121, 122 Atl. 220 (1923). Barker v. Bryn Mawr College has dicta implying that state colleges are subject to a higher standard than private schools. *Accord*, John B. Stetson Univ., 88 Fla. 510, 516, 102 So. 637, 640 (1924); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

56. People *ex rel.* Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956); Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144 (Cuyahoga Co.), 11 Ohio C.C. Dec. 515 (1901).

57. See State *ex rel.* Crain v. Hamilton, 42 Mo. App. 24 (1890); State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 263 Pac. 433, *cert. denied*, 277 U.S. 591, *error dismissed*, 278 U.S. 661 (1928) (student didn't deny charge); Koblitz v. Western Reserve Univ., note 56 *supra*; Miller v. Clement, 205 Pa. 484, 55 Atl. 32 (1903).

58. See cases cited at note 55 *supra.*

rule: that a school may use whatever procedure a fair man might choose in conducting its inquiry and in giving the student an opportunity to provide information.[59] More formal procedures, denominated "quasi-judicial," are imposed by some courts which draw upon notions of due process, natural justice, or fundamental fairness.[60] Often excluded from the requirements courts impose on such hearings are those elements of the court trial thought to be inappropriate for use at a school, such as the niceties of evidentiary rules,[61] the imposition of an oath,[62] and, sometimes, oral cross-examination.[63] The strictest procedural standard suggested for expulsion hearings is the "judicial" model, requiring procedural safeguards similar to those of a criminal trial.[64] Recent cases in the U.S. Fifth Circuit Court of Appeals and in the Judicial Committee of the Privy Council suggest that the quasi-judicial standard is required of American public colleges and the universities of the Commonwealth.[65] While some of the older cases suggest, on common law principles, a judicial or quasi-judicial standard for American private colleges,[66] more re-

59. See Koblitz v. Western Reserve Univ., *supra* note 56 (faculty must act "as jurors"); *cf.* Goldstein v. New York Univ., 76 App. Div. 80, 78 N.Y. Supp. 739 (1902); Vermillion v. State *ex rel.* Englehardt, 78 Neb. 101, 110 N.W. 736 (1907) (public school); State *ex rel.* Ingersoll v. Clapp, 81 Mont. 200, 216-17, 263 Pac. 433, 437-38, *cert. denied*, 277 U.S. 591, *error dismissed*, 278 U.S. 661 (1928).

One justification for a rule that "due examination" does not require a "formal trial," was stated by a court faced with a public school expulsion. It reasoned that "from the necessity of the case such examinations must be wholly informal. Directors of school districts must frequently come from the plain and unlearned farmers and citizens of the country, unused to matters of judicial inquiry." State *ex rel.* Crain v. Hamilton, 42 Mo. App. 24, 31 (1890). But universities, of course, have available to conduct hearings the members of their faculty, as well as the students; universities with law schools may make special use of law students or law professors for the conduct of disciplinary inquiries.

60. Baltimore Univ. v. Colton, 98 Md. 623, 57 Atl. 14 (1904); Comm. *ex rel.* Hill v. McCauley, 2 Pa. County Ct. 459 (1886); 3 Pa. County Ct. 77 (1887); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822, *cert. denied*, 319 U.S. 748 (1942) (doctrine recognizing rule as accepted by "all the authorities." 180 Tenn. at 111, 171 S.W.2d at 827.); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961); University of Ceylon v. Fernandez, [1960] 1 Weekly L.R. 223 (Privy Council, applying common law principles), *reversing* 58 N.L.R. 265 (Ceylon 1956).

61. Morrison v. City of Lawrence, 186 Mass. 456, 72 N.E. 91 (1904).

62. Koblitz v. Western Reserve Univ., 21 Ohio Cir. Ct. 144, 11 Ohio Cir. Dec. 515 (1901).

63. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1960), *cert. denied*, 368 U.S. 930 (1961).

64. Comm. *ex rel.* Hill v. McCauley, 2 Pa. County Ct. 459 (1886), 3 Pa. County Ct. 77 (1887); Geiger v. Milford Ind. School Dist., 51 Pa. D. & C. 647 (1944).

65. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). *Accord*, Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961). University of Ceylon v. Fernandez, [1960] 1 Weekly L.R. 223 (Privy Council, on common law principles), *reversing* 58 N.L.R. 265 (Ceylon 1956).

66. Baltimore Univ. v. Colton, 98 Md. 623, 57 Atl. 14 (1904); *cf.* cases cited in notes 60 and 64 *supra*.

cent cases approve informal hearings or, where the college catalog has reserved that power, expulsions with no hearing or charges.[67]

All of these limitations might be generalized into a requirement imposed by courts as a minimum standard on school disciplinary authority no matter what its source—a requirement of "reasonableness."[68] While a few courts may still indulge in a presumption that schools have acted reasonably,[69] the present majority view seems to be that reasonableness is a question of fact.[70] The reasonableness rule which extends to both substance and procedure might be stated as follows: that expulsion must proceed from reasonable rules reasonably applied.

The courts, however, resting on the easy use of legal analogies, have failed to supply meaningful content for this verbalization of the reasonableness rule.[71]

---

67. People *ex rel.* Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N.E. 635 (1957); De Haan v. Brandeis Univ., 150 F. Supp. 626 (D. Mass. 1957).

68. To those who have charge of the culture of our youth, is conceded the power of making needful rules and regulations for their government and control, and these may be enforced, if done in a due manner without external interference, even though at times hardships may seemingly be done and innocency suffer, but the reasonableness of such rules and regulations, as well as the regularity of the proceedings under them, have been decided, not infrequently, to be a proper subject for judicial inquiry.

Commonwealth *ex rel.* Hill v. McCauley, 2 Pa. County Ct. 459, 463 (1887). State *ex rel.* Stallard v. White, 82 Ind. 278, 286 (1882); see also Connell v. Gray, 33 Okla. 591, 127 Pac. 417 (1912); Frank v. Marquette Univ., 209 Wis. 372, 377, 245 N.W. 125, 127 (1932). The rule "that dismissals must not be arbitrary, in bad faith, or in the abuse of discretion" has been called usual. Note, 35 COLUM. L. REV. 898, 899 (1935). See also cases cited at note 60 *supra.*

Even where a statute grants *in loco parentis* authority over pupil behavior, it will be construed to authorize no more than reasonable punishment. Rupp v. Zintner, 29 Pa. D. & C. 625 (1937).

69. Phillips v. Johns, 12 Tenn. App. 354 (1930) (recognizing rule); see also cases collected in Annot. 43 A.L.R.2d 477 (1955). *Cf.* Anthony v. Syracuse Univ., 224 App. Div. 487, 231 N.Y.S. 435 (1928). It has been held that the presumption exists merely in the absence of testimony; that there was a burden on the pupil of going forward with evidence, but not a burden of proof. Haycraft v. Grigsby, 88 Mo. App. 354, 94 Mo. App. 74, 67 S.W. 965 (1901).

70. Lander v. Seaver, 32 Vt. 114 (1859); Clasen v. Pruhs, 69 Neb. 278, 95 N.W. 640 (1903) (recognizing rule); see cases collected in Annot. 43 A.L.R.2d at 476-77.

71. In several cases, college discipline which impaired the exercise by students of freedom of religion or free speech was sustained by courts as "reasonable," or even lauded, without consideration of the principle espoused by most educators, that no impairment of freedom of expression can be reasonable within the liberal arts university. See writers cited note 166 *infra.* Private college cases during World War I demonstrated judicial approval of college punishment of students for unpopular political sentiments. The making of off-campus, anti-war speeches was held to be a valid ground of expulsion in Samson v. Trustees of Columbia Univ., 101 Misc. 146, 167 N.Y. Supp. 202 (1917) and the alleged socialistic opinions of a senior law student were held to justify his expulsion in People *ex rel.* Goldenkoff v. Albany Law School, 198 App. Div. 460, 191 N.Y. Supp. 349 (1921).

And in the post World War II atmosphere, Michigan State University expelled a veteran who had been placed on "strict" probation for distributing F.E.P.C. leaflets on campus

In an old New York state case, for example, a student was expelled from New York Law School for denying that he had passed an innocuous, but unappreciated note to a female fellow student. Drawing on basic principle of contract law, the trial court ridiculed the notion that the school, one party to the contract for education, could constitute itself a tribunal to decide when the student had breached the contract and forfeited his right to education. The question of breach was for decision by courts. Reversing, the appeals court held that status rather than contract law governed, and that the school's inherent power to decide questions of student conduct and expulsion had been properly exercised and compelled denial of reinstatement.[72] A generation later, when Syracuse University expelled a girl without charges, for the reason that she was not "a typical Syracuse girl," the New York trial court applied status theory and concluded that the school had violated certain minimum rights inherent in the student status. On this occasion the appeals court resorted to contract law in reversing, holding that expulsion without charges or hearing was authorized because the school catalog reserved such power.[73] Where private-law concepts were employed by a Federal District Court to uphold expulsions of Negro sit-in demonstrators from Alabama State College, the Fifth Circuit reversed, using a public law due process concept as a model to dictate the disciplinary

after being denied a club charter for such activities. He allegedly organized an off-campus meeting at which the main speaker was a Communist, and was then expelled for violation of his probation. The University impliedly claimed that state colleges may prohibit students from organizing off-campus political activities. The Michigan Supreme Court's denial (unreported) of petitions for mandamus and for rehearing, and the U.S. Supreme Court's denial of certiorari, without opinions, did little to clarify the "reasonableness" of this claim of the state college for exemption from normal constitutional standards. Zarichny v. State Board of Agriculture, *mandamus denied*, Jan. 13, 1949, *rehearing denied*, Feb. 28, 1949, Michigan Supreme Court (unreported); *cert. denied*, 338 U.S. 816 (1949). For facts of the case see 17 U.S.L. WEEK 3374; Petition for Certiorari, pp. 1-5; Brief in Support of Petition for Certiorari, pp. 8-11; Brief in Reply to Petition for Certiorari, pp. 6-10. See also Steier v. New York State Educ. Comm'r, 271 F.2d 13 (2d Cir. 1959), *cert. denied*, 361 U.S. 966 (1960) (sustaining expulsion of student for campaign of criticism against school authorities); Lessin v. Regents of the Univ. of Calif., Superior Ct., Riverside Co. (unreported, see note 15 *supra*) (refusing to interfere with school rule barring Communist speakers from campus); Robinson v. Univ. of Miami, 100 So. 2d 442 (Fla. App.), *cert. denied*, 104 So. 2d 595 (Fla. 1958) (sustaining exclusion of student from teacher-training program because of his atheism); Egan v. Moore, 36 Misc. 2d 967, 235 N.Y.S.2d 995 (1962) (enjoining state university from allowing Communist speakers on campus).

Some schools and courts do appear to be solicitous of student political rights. Thus, officers of an Indiana University socialist club were indicted for attending a club meeting at which, allegedly, the forcible overthrow of the government had been advocated. The University refused to suspend or expel the students. N.Y. Times, May 3, 1963, p. 11, col. 1. And see Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961) (sit-in demonstrators reinstated); Swan v. Board of Higher Educ., Docket No. 27996, 2d Cir., June 4, 1963. (*semble*).

72. Goldstein v. New York Univ., 38 Misc. 93, 77 N.Y. Supp. 80, *rev'd*, 76 App. Div. 80, 78 N.Y. Supp. 739 (1902).

73. Anthony v. Syracuse Univ., 130 Misc. 249, 223 N.Y. Supp. 796, *rev'd*, 224 App. Div. 487, 231 N.Y. Supp. 435 (1928).

procedures required at least of state colleges.[74] Conversely, in the St. John's University expulsion case, where students were expelled for participation in a civil marriage ceremony, the trial court drew upon the public law notion of fair warning to determine the appropriate standard of notice of rules required; reversing, the higher state court also required notice, but used the private law concept of expectation to give content to that standard, holding that the students might be expelled even though no specific rule prohibited their actions, since they were held to have had actual expectation that the school would disapprove their acts.[75]

Doctrinal Alternatives

These four pairs of reversals illustrate the manner in which courts talk as if the analogies upon which they draw compel the conclusion whether to sustain or invalidate expulsions. Were courts to think through these analogies, or to create new ones on the model of ordinary citizens' rights, they would find a more effective means of exercising review than they now seem to think possible.

A. *Contract Alternatives*

Using the express contract analysis for student cases—characterizing broad reservation of power to discipline and waiver clauses as terms of a school-student contract—courts have traditionally refused to interfere with discharges.[76] And this reluctance does not seem to spring from the fact that reinstatement rather than damages for breach is sought as remedy.[77] Rather, once the court has seized upon the contract analogy, it acts as if it were driven to finding for the college. Yet these student "contracts" are created under circumstances

74. Dixon v. Alabama State Bd. of Educ., 186 F. Supp. 945 (M.D. Ala. 1960), *rev'd*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). See note 5 *supra*.

75. Carr v. St. John's Univ., 34 Misc. 2d 319, 231 N.Y.S.2d 403, *rev'd*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 235 N.Y.S.2d 834 (1962); see note 7 *supra*.

76. A typical catalog clause on university discipline is that of St. John's University under which students were held to have been validly expelled for participating in a civil marriage ceremony:

> In conformity with the ideals of Christian education and conduct, the University reserves the right to dismiss a student at any time on whatever grounds the University judges advisable. Each student by his admission to the University recognizes this right. The continuance of any student on the roster of the University, the receipt of academic credit, graduation, the granting of a degree of certificate, rests solely within the powers of the University.

Carr v. St. John's Univ., 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 235 N.Y.S.2d 834 (1962), discussed *supra* note 7. See text at notes 14 and 37-38 *supra*.

77. On principle, it would seem that a court should be willing to grant the compensatory remedy of reinstatement whenever an expulsion is unreasonable, even though it might require malice, or lack of *bona fides* as an additional element of the action before granting judgment for cash damages, especially if termed punitive.

where the bargaining positions of the parties are extremely disparate. Modern courts, resting on similar disparities, have taken a far more restrictive attitude toward the binding force of such "contracts" in other areas.

The university's reservation of power to discipline and the student's waiver give the university power to terminate the school-student relationship despite partial performance by the student.[78] This power may be characterized as power to perform or not at its own will, as power to determine finally whether breach occurred, or as an ouster of the jurisdiction of the courts to review claims arising out of expulsions. The clauses are standarized terms of a complex printed document. They are proposed in a manner which brooks no negotiation and by a party which, by virtue of its experience and its strong seller's position, is clearly able to impose conditions. The student is in an unusually weak bargaining position. Most often he is of an age such that only limited competency to contract is imputed to him; his promises are ordinarily unenforceable against him.[79] Indeed, it has been suggested that a minor's contract for education is enforceable against him only when, as a whole, the agreement is clearly beneficial to the student.[80]

Characterization of the clauses as conferring power on the college to perform or not at its own will would lead to the conclusion that no express contract exists. Reservation of so broad-reaching a power arguably renders the promise illusory and the contract nugatory.[81] Yet the parties would, by virtue of their on-going relationship, have rights *inter sese*. Before the expulsion, the student had reasonably and substantially relied to his detriment through the expenditure of time, effort, and funds in the induced expectation that by meeting reasonable standards he would receive a degree.[82] The court might therefore fashion its remedy on a theory of constructive contract for education. The terms of this contract could be found in those catalog conditions and "customs of the trade" which meet the test of reasonableness.[83]

Alternatively, characterization of the clauses as bestowing upon the university power finally to determine the occurrence of breach might, in the context of

78. Once the student enters into performance—by reliance through abandonment of other offers of admission, by beginning his studies, or by making his first tuition payment—the contract entered into is an indivisible one for the full period leading to a degree. See Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N.W. 589 (1909). *Cf.* WILLISTON, CONTRACTS § 49 (3d ed. 1957).

79. See 1 CORBIN, CONTRACTS § 6 (1950).

80. A fiduciary theory has been suggested as doctrinal source of the duties of advance warning and utmost fairness said to be owed by the school of the student. Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407, 1409 (1957). See Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144 (Cuyahoga Co.), 11 Ohio C.C. Dec. 515 (1901) (*dictum*) (concept of waste of trust's facilities if student is wrongfully dismissed before graduation).

81. Note, 77 U. PA. L. REV. 694, 695 n.7 (1929).

82. See note 78 *supra*.

83. For use of custom as a source to find the terms of the customary relationship—assent to which is said to be manifested primarily by conduct—see, *e.g.*, John B. Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1924); Lander v. Seaver, 32 Vt. 114 (1860).

the other strong indications of imbalance of bargaining position, lead to treatment of the agreement as adhesionary.[84] At the least, strict construction against the university, and insistence upon proof of actual notice to the student of inequitable terms, would seem to be dictated by the doctrines of contracts of adhesion;[85] further protection against "unconscionable" or "unreasonable" terms might be achieved through a refusal to enforce, on public policy grounds. Broadly stated terms might be restricted in their scope to the procedures and scope of activities which the student would reasonably have assumed the institution to have meant.[86]

Finally, the clauses, if characterized as attempts to prevent judicial review of expulsion claims growing out of the contract, might be severed from the rest of the contract and struck down on the public policy grounds invoked in similar contract situations.[87] Such treatment could be afforded whether or not the contract as a whole is characterized as adhesionary, as it has been where union constitutions contain similar clauses.[88]

Thus, following out the contract analogy which it has chosen, a court in expulsion cases could apply the contract law of party imbalance, providing substantially greater freedom to give effect to its notions of reasonableness. And where only implied contract theories are utilized, the judge is free, as suggested by relevant case law, to read such terms into the contract as justice to both student and university seems to demand.[89] The freedom of courts to use contract as a device to broaden, rather than narrow, court review is well demonstrated by a frequent judicial review of internal union discipline through a contract theory of union constitutions.[90]

B. *In Loco Parentis Alternatives*

In college situations, courts have seemed to borrow *in loco parentis'* doctrines as sources of power without importing the limitations upon that power. But extension to collegiate situations of the limitations usually imposed upon

84. *Cf.* 3 CORBIN, CONTRACTS § 559 (1960); RESTATEMENT, CONTRACTS § 236(d); Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); see also 6A CORBIN, CONTRACTS § 1375 n.9; § 1376 (1962).

85. *Cf.* note 80 *supra.*

86. *Ibid.*

87. *Cf.* 6A CORBIN, CONTRACTS § 1527 (1962); see generally, Comment, *Limitations on Freedom to Modify Contract Remedies*, 72 YALE L.J. 723, esp. 755-69 (1962).

88. See Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960).

89. See 1 WILLISTON, CONTRACTS § 3 (1936); 5 *id.* at § 1293 (1937).

90. Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960).

> The doctrinal structure, despite the superficial rigidity of the contract theory, is loose-jointed and flexible in the hands of the courts. The nature of discipline provisions, as well as the sensitive and vital interests involved, increase this flexibility and the courts have used it freely to impose judicial regulation on union discipline. Within wide limits, it is not the union constitution but the court which controls.

Id. at 186.

in loco parentis at the grammar school level could restrict the imposition of expulsion as punishment. Where expulsion would permanently degrade the student or close professional doors, or is inflicted without specific charges, it seems highly analogous to schoolmaster punishment which is unexplained [91] or works permanent physical harm.[92] Consequently, the importation of limits on schoolmaster authority into the collegiate situation seems fully appropriate.

If the court views *in loco parentis* in its original terms, as an express or implied parental delegation rather than an assumption of similar authority based on similar functional needs, other limitations on college authority to expel may be suggested. Students over twenty-one would not be subject to the college paternalism, parental statements of permissible activity (or norms of parental control for children of that age) would be adopted. Expulsion would be severely restricted as an available remedy, since it involves severance of the parental relationship—an action unanticipated save in the most extreme circumstances.

Where the court views the parent-school analogy in functional terms, a limitation of authority to the scope of the functional similarities flows from the doctrine. For the modern, nearly-mature college student and the modern, impersonal university, the grounds for similarity to the family context seem few. The university is not able to act in the personal manner of a parent;[93] the student hardly needs the guidance given a child. Expulsion remains a punishment foreign to the parental role.

The parental analogy suggests that only the manner in which a parent might choose to discipline is proper for the university's action. But does the institution engage in a personal exercise of authority attended by substantial and careful inquiry into underlying facts? *In loco parentis* reasoning is strained by the fact that expulsion is contemplated. Where *in loco parentis* is still used to defend university action, it may be little more than a conclusory category grounded upon assumptions of inherent power—the authority of the school *qua* school. And the institutional analysis suggested by this approach seems to entail limitation of authority to that required for the genuine needs of the school by its institutional responsibilities to its students. Since it would depend, not upon necessarily imperfect analogy, but upon analysis of the em-

91. See note 45 *supra.*

92. See note 41 *supra.*

93. *A fortiori* the university cannot act as a parent would, for even a schoolmaster cannot.

> From the intimacy and nature of the relation, and the necessary character of family government, the law suffers no intrusion upon the authority of the parent, and the privacy of domestic life, unless in extreme cases of cruelty and injustice. This parental power is little liable to abuse, for it is continually restrained by natural affection, the tenderness which the parent feels for his offspring, an affection ever on the alert, and acting rather by instinct than reasoning.
>
> The schoolmaster has no such natural restraint. Hence he may not safely be trusted with all a parent's authority, for he does not act from the instinct of parental affection. He should be guided and restrained by judgment and wise discretion, and hence is responsible for their reasonable exercise.

Lander v. Seaver, 32 Vt. 114, 122-23 (1859).

pirical factors involved in the situation presented to the court, this mode of approach to the problems of student-university relations would seem potentially the most fruitful. What these institutional needs of schools are, however, has rarely if ever been investigated by the courts. Extensive discussion of them and of the limits which they entail will be postponed to Part II of this Comment.

C. *Constitutional Alternatives*

Fuller development of one further source of limitations within the confines of present doctrine does seem possible—the application of constitutional doctrine or constitutionally derived doctrine to the school expulsion situation. Application of the Constitution to state schools has already been noted. As an arm of state government, the state university is subject to all the restrictions, substantive and procedural, which circumscribe governmental action generally.[94] Expulsion for failure to attend compulsory chapel [95] or for engaging in nonviolent assertion of political rights would be improper, as would be expulsion without procedural due process.[96]

What is less clear is the application of constitutional safeguards, substantive and procedural, to "private" schools. The involvement of these schools in quasi-governmental activity, the public importance of their function, and their frequently close association with state and federal government, raise the possibility of an extension of constitutional doctrines by "paraconstitutional" techniques such as have been used in other areas of the law to proliferate the purpose of constitutional doctrines.[97] These "paraconstitutional" techniques use the judicial armory of alternative doctrines and broad common law notions—such as "reasonable"—to give effect to constitutional policy. For example, while in the state college case of *Dixon v. Alabama State Board of Education* [98] the court used "due process" language, it was the characteristics

94. See cases cited notes 49-54 *supra*.

95. It may be that even the private, secular, school has no power to compel church attendance on a student against his religious beliefs. See Miami Military Institute v. Leff, 129 Misc. 481, 220 N.Y.S. 799 (1926); *contra*, People v. Wheaton College. *Compare* North v. Board of Trustees of University of Illinois, 137 Ill. 296, 27 N.E. 54 (1891).

96. See Dixon v. Alabama State Bd. of Educ., 186 F. Supp. 945 (M.D. Ala. 1960), *rev'd*, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Knight v. State Bd. of Educ., 200 F. Supp. 174 (M.D. Tenn. 1961).

If access to the bar may not be refused by a character and fitness committee without affording confrontation and cross-examination, it might seem that the state professional school, whose order of expulsion is the equivalent of such a denial of access, should afford the same protection. Willner v. Committee, 31 U.S.L. WEEK 4439 (May 13, 1963).

97. For example, in Associated Press v. United States, 326 U.S. 1 (1945), the wire service monopoly case, the Supreme Court held that "the First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary." *Id.* at 20, per Black, J. Justice Frankfurter, concurring, took the bylaws of the Associated Press as violating the Sherman Act's rule of reason because they "offended" the interest in free expression protected by the First Amendment. "A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship." *Id.* at 38.

98. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

of colleges in general, not of state colleges alone, that dictated the content of the standard. Were a private college case on all fours with *Dixon* now to arise, "paraconstitutional" technique could easily be employed for effectuating the "constitutional" policy of fairness, by applying the same requirement under the rubric of "reasonableness."

Steele v. Louisville & Nashville R.R.[99] suggests one basis on which application of constitutional policies to the private university situation could be built. A Negro non-member of a union, alleging that the union had discriminated against Negroes in bargaining, sued for relief from the union-employer contract which purported to govern the terms of his employment. Observing that the union, as a bargaining agent under the Railway Labor Act, acted "by authority of the statute"[100] and was "clothed with powers not unlike that of a legislature,"[101] the Supreme Court concluded that Congress "did not intend to confer plenary power . . . without imposing on [the union] any duty to protect"[102] those who otherwise would have "no means of protecting their interests."[103] The statutory duty imposed was held to be "at least as exacting duty . . . as the Constitution imposes upon a legislature." Chief Justice Stone observed that were such a statutory duty not implied, "constitutional questions arise."[105] The power of private universities to "govern" students or make "laws" for them is similarly granted by statute, *i.e.*, the special chartering acts,[106] which still retain significance despite the possible decline in significance of corporate charters.[107] Students have no more given their consent to the exercise of authority against them than have workers. Workers pick their industry, and students their school. Workers are subject to the bargaining agent who exists in their industry, students to the authorities who exist in their colleges. Universities, like unions, are not realistically described as private, but as quasi-public institutions. And the educational process is as important a social experience as is the work relationship. The disciplinary power of college officials seems to partake more of the characteristics of legislative power than does the power to bargain. Thus, university discipline might readily be brought under the doctrine of *Steele,* and be subject to duties of fairness at least as exacting as constitutional duties.

But the constitutional restrictions of the Fourteenth Amendment have traditionally been found applicable only where "state action"[108] is found to be

99. 323 U.S. 192 (1944). *Cf.* Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946); James v. Marinship Corp., 25 Cal. 2d 721, 731, 155 P.2d 329, 335 (1944).

100. 323 U.S. at 194.

101. *Id.* at 198.

102. *Id.* at 199.

103. *Id.* at 201.

104. *Id.* at 202.

105. *Id.* at 198.

106. See note 29 *supra.*

107. *But see* Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power,* 100 U. PA. L. REV. 933 (1952).

108. "[N]or shall any state deprive any person of life, liberty, or property without due process of law. . . ." U.S. CONST., Amend. XIV, § 1.

present. The test has been the extent of significant state participation in the enterprise—through financial assistance or through regulation and control—or the extent to which the enterprise acts under the color of state authority.[109] The association of "private" colleges with the state seems such that they readily could be included within the amendment's due process and equal protection requirements. State participation in "private" schools, notably through financial subsidy for the schools.[110] Such exemptions have been justified, in fact, by judicial holding that private colleges fulfill a public purpose.[111] Moreover, a significant part of the cash income of private colleges flows from governmental sources including direct grants.[112] Besides giving financial aid, governments exercise a degree of direct supervision and control over the affairs of "private" colleges.[113] In some cases they are chartered by a special act of the legislature, which includes a specific delegation of legislative power.[114] "Private" colleges may be subject to state supervision through authority reserved in their state charters.[115] Several states have agencies to supervise the administration of "private" colleges.[116] Formal state supervision of some private colleges is at

109. Cooper v. Aaron, 358 U.S. 1, 4 (1958) ("state participation through any arrangement, management, funds or property"); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (even though actual operation in private hands); Shelley v. Kraemer, 334 U.S. 1 (1947) (enforcement through courts of impermissible arrangement); Screws v. United States, 325 U.S. 91 (1945) (action under color of state authority); Williams v. United States, 341 U.S. 97 (1951) (private detection); Monroe v. Pape, 365 U.S. 167 (1961).

110. A number of colleges are tax-exempt, not by statute, but by irrepealable charter provision. For a list of such colleges, see BLACKWELL, COLLEGE LAW 157 (1961). Every state, however, grants such an exemption, whether by constitutional provision, statute, or judicial interpretation. See *id.* at 279-304, for the statutory provisions of each state. See INT. REV. CODE OF 1954, § 170; 26 C.F.R. § 1.170, 2(b)(3) (1961).

111. Yale Univ. v. Town of New Haven, 71 Conn. 316, 42 Atl. 87 (1899); New Haven v. Sheffield Scientific School, 59 Conn. 163, 22 Atl. 156 (1890). Compare Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

112. According to the Financial Report of Columbia University, for example, approximately 38% of the university's 1961 income came from the federal government contract program. See also the loan, fellowship, and college financial assistance program of the National Defense Education Act, 72 Stat. 1581, 20 U.S.C. § 401 *et seq.* (1958).

113. See, *e.g.*, THE BOOK OF THE STATES 1960-1961, p. 300; N.Y. EDUC. LAW § 601; National Defense Education Act, 72 Stat. 1580, 20 U.S.C. § 401 (Supp. IV, 1959-62).

Federal funds may total a fourth or more of the income of a university. Some government aid schemes are annual grants to all colleges in the state proportional to the number of students. N.Y. EDUC. LAW § 601-a (termed a Scholar Incentive Program and said to be a grant "to" the student sent "in care of" his school).

114. Note 29 *supra.*

115. Of thirty-nine institutions surveyed in BARTLETT, STATE CONTROL OF PRIVATE HIGHER EDUCATION 91 (1926) thirty were chartered by special act, and nine under general law; one-third of the charters reserved to the state the right to amend or repeal.

116. *Id.* at 51-59. See also RESEARCH DIVISION, NATIONAL EDUCATION ASSOCIATION, STATE AUTHORITY WITH RESPECT TO THE ESTABLISHMENT AND SUPRVISION OF NONPUBLIC SCHOOLS AND COLLEGES (2d rev. ed. Aug. 1951).

The Act of 1787 gave the Regents of the University of New York power to "visit and inspect all the colleges, academies or schools which are or may be established in the state."

times so extensive that the state legislature has reserved the power to revise student regulations, and has established seats on the college governing board to be filled by state officials.[117] In addition to their identification with the state through financial aid and regulation, all colleges act under color of state authority. Colleges are among the few institutions in our society whose function is the award of new statuses—degrees.[118] The authority to award such statuses is not that of the school itself, but that of the state, which has specially authorized certain schools to grant certain degrees.[119] Indeed, a number of "private" colleges—including Harvard, Yale, Stanford, and Tulane—are explicitly "constitutional" bodies, in the sense that their creation is confirmed by name in a provision of the state constitution.[120] As a result of all these forms of state participation and assistance, few if any "private" colleges are exempt under the "state action" test.

On such an analysis of state assistance, a privately organized and managed library school has been held subject to constitutional prohibitions of discrimination, in *Kerr v. Enoch Pratt Free Library*.[121] And Judge Skelly Wright, in an order for summary judgment, later vacated, held that Tulane University, though a "private school", had a degree of connection with the state such that the school was subject to constitutional requirements.[122] He questioned

---

BARTLETT, *op. cit. supra* note 115, at 90. Columbia University, whose charter dates to colonial times, is exempt from this power of "visitation." For the powers of the Regents see N.Y. EDUC. LAW §§ 206-08, 215, 219. A sample report form is at BARTLETT, 64-67. The "visitor" of a university is an office known to the common law—usually the sovereign, the founder, or its representative, and has powers of general supervision over the policies and affairs of the institution. Koblitz v. Western Reserve Univ., 21 Ohio C.C.R. 144, 11 Ohio C. Dec. 515 (1901).

117. See the Charter of Yale University, excerpted *supra* note 29.

118. Among the few other comparable legal status still recognized today are those of citizen, felon, elector and spouse. Though the status of degree recipient is or can be awarded by a "private" school—"with all the rights privileges, and immunities thereunto appertaining"—the status is recognized by the state for such purposes as qualifications for professional licensing and civil service requirements.

119. In 26 states the laws grant general power to confer degrees.
In 2 states power to confer degrees rests solely with the legislature.
In 10 states the educational agency approves the articles of incorporation or gives license to confer degrees. . . .
In 1 state the articles of incorporation specify the degrees.
In 7 states no mention of degrees is made.
BARTLETT, *op. cit. supra* note 115, at 49.

By statute in 1935 New York prohibited the granting of professional degrees "unless the right to do so shall have been granted by the regents in writing . . . ." N.Y. EDUC. LAW § 224.

120. Massachusetts Constitution, ch. V, § 1; Connecticut Constitution, art. VIII, § 1; California Constitution, art. IX, § 10; Louisiana Constitution, art. XII, § 24.

121. 149 F.2d 212 (4th Cir. 1945).

122. 203 F. Supp. 855 (E.D. La.), *vacation of decision approved on appeal of new decree*, 306 F.2d 489 (5th Cir. 1962).

> whether any school or college can ever be so "private" as to escape the reach of the Fourteenth Amendment . . . . Institutions of learning are not things of purely private concern. The Supreme Court of the United States has noted that "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." Brown v. Board of Education of Topeka, . . . 347 U.S. 493. . . . No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution . . . . Clearly the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action, to the same extent as private persons who govern a company town, Marsh v. State of Alabama, 326 U.S. 501, . . . or control a political party, Terry v. Adams, 345 U.S. 461, . . . or run a city street car and bus service, Public Utilities Comm. v. Pollak, 343 U.S. 451 . . .; Boman v. Birmingham Transit Company, 5 Cir. 280 F.2d 531 or operate a train terminal, Baldwin v. Morgan, 5 Cir., 287 F.2d 750?[123]

And where state law or official policy is found to require school disciplinary measures which are racially discriminatory or otherwise infringe on constitutional rights, such school disciplinary measures will not pass scrutiny of the courts, under the doctrine of the *Sit-in Cases*,[124] even if taken by private schools supposedly without reference to the state mandate. On a doctrinal basis, all these developments follow clearly from the authorities, thus providing courts with a foundation for imposing first amendment, due process, or equal protection standards on a nominally "private" school.

Some commentators, however, find the "state action" test potentially too broad; they have suggested that only enterprises which perform "governmental functions" or, under a more rigorous standard, only enterprises which share *de facto* the power of governing be included with the constitutional requirement.[125] But under either of these limited interpretations, the doctrinal possibility of holding private schools subject to constitutional standards remains open. Education has been held to be a most important governmental function.[126] And school discipline is governing within a reading of the doctrine

123. 203 F. Supp. at 858-59.

124. See Petersen v. City of Greenville, 31 U.S.L. WEEK 4475 (May 20, 1963) (ordinance); Lombard v. Louisiana, 31 U.S.L. WEEK 4476 (May 20, 1963) (official policy).

125. See, *e.g.*, Wellington, *The Constitution, The Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961).

126. Brown v. Board of Educ., 347 U.S. 483, 493 (1954). It has also been suggested that the category "governmental function" properly includes activities of a kind which are regular and substantial facets of governmental operation. The reasoning is that, were the "private" enterprises to shut down, the government would have to take their place. Thus, it is concluded, the "private" enterprises are performing a function in the place of the government. Under such an analysis, education and justice—the two chief activities of state and local governments—would be the "governmental functions" *par excellence*, and justice on campus, *a fortiori*, would be a "governmental function" and therefore subject to constitutional requirements.

established by the *White Primary Cases:*[127] whoever is allowed by the state to participate in the processes of governing is subject to the same limitations as the state itself. Further, *Marsh v. Alabama*[128] shows that even a private property owner's making and enforcing of rules for the life of a community falls within the constitutional command. In *Marsh,* officials of the company town of Chickasaw had procured the arrest of a Jehovah's Witness for distributing religious leaflets on private streets. The Supreme Court held that though the town was not treated by state law as a political unit, it functioned as a residential community and its "rulings" must therefore permit the basic freedoms of expression for those "who live in or come to" the town. Colleges would seem to come under the rationale of *Marsh.* College communities are like company towns in consisting of groups of persons connected with a private corporation, living on its private property, contracting with it, and subject to its power. Their rules, like those of the company town, are attempts to regulate the life of a social community.[129]

The inclusion of college communities under constitutional jurisdiction would not, however, necessarily mean that such institution would be required to follow the same detailed procedure which governs courts or regulatory agencies. As the Fifth Circuit held in *Dixon v. Alabama State Board of Education,*[130] though a college be subject to constitutional jurisdiction, the content of the constitutional rule depends on the adaption of general principles to the college situation and the facts of each case. In *Dixon* the demands of procedural due process were said to be satisfied by a semi-formal hearing susceptible of insertion into school routine. Similarly, inclusion of "private" colleges under constitutional jurisdiction would not necessarily require the application to such colleges of the existing specific first and fourteenth amendment doctrines. An extension of constitutional jurisdiction would, however, provide guides for decision of new cases, authority for federal courts to act, and legitimacy for judicial action to protect personal rights.

Summary

The courts have expressed a reluctance to interfere with university expulsions. Whether as a reason or as a mode of expression, courts have discussed

127. Nixon v. Herndon, 273 U.S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Grovey v. Townsend, 295 U.S. 45 (1935); United States v. Classic, 313 U.S. 299 (1941); Smith v. Allwright, 321 U.S. 649 (1944) (overruling *Grovey*). "Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise." Rice v. Elmore, 165 F.2d 387, 391 (4th Cir. 1947), *cert. denied,* 333 U.S. 875 (1948); Terry v. Adams, 345 U.S. 461 (1953).

128. 326 U.S. 501 (1946).

129. Whether a corporation or a municipality owns or possesses the town the public . . . has an identical interest in the functioning of the community in such manner that the channels of communication remain free. . . . The managers [of Chickasaw] appointed by the corporation cannot curtail the liberty of press and religion . . . consistently with the purposes of the Constitutional guaranties.

Id. at 507-08.

130. 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961).

this court-school relation in terms of contract, status, and constitutional analogies. But courts have been unable or unwilling to recognize the great freedom available to them within the legal framework provided by those analogies. Nor have they formulated reasoned principles by which to exercise that freedom. Only in a few decisions have courts faced up to effective review —the judicial task of sorting out and assigning priorities to competing policy considerations, and assessing the institutional demands and capacities of the university vis-a-vis the courts. The second half of this Comment seeks to establish the need for greater court review and to raise, if only by suggestion, the problem which courts have been unwilling to face: their relative competence in the various aspects of student discipline, and the university's varying needs for discretion to discipline.

PART II
THE FACTS OF COLLEGE DISCIPLINE

School Interests v. Judicial Interests: Autonomy Balanced by Social Concern

A. *The Need for Judicial Inquiry.*

Expulsion, as has been demonstrated, may work a severe social deprivation upon its subject. This in itself might imply the need for judicial supervision, even of private institutions, under normal tort principles. An orthodox approach, however, regards all non-government organizations and associations as "private," with inherent right to make autonomous decisions.[131] From this right, these groups are said to derive the privilege to inflict deprivations on others—through exercise of such freedoms as freedom to choose customers, to associate, and to contract.

While our society has an abhorrence of arbitrary deprivation exemplified in the rule that no person shall be deprived of life, liberty, or property without due process,[132] the ordinary actions of most private persons are thought to be sufficiently limited so as not to be intolerably arbitrary. And in economic, associational, and family relations, deprivations of liberty or property occur as a matter of course without necessarily incurring the regulation of due process of law. The competitive pressures of the market, the internal political pressures of association elections, and the social pressures of mores and expectations are extra-legal instruments of social control;[133] to the extent that these instruments limit deprivations, autonomous power[134] may exist without having an unacceptable potential for tyranny.

131. See Munn v. Illinois, 94 U.S. 113 (1876); Sinking-Fund Cases, 99 U.S. 700, 718-19 (1878); Smyth v. Ames, 169 U.S. 466, 522, 526 (1898), treating corporations as if they were natural persons for purposes of the Fourteenth Amendment; *but see* Northern Securities Co. v. United States, 193 U.S. 197, 362 (1904) (concurring opinion); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

132. ". . . nor shall any state deprive any person of life, liberty or property without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

133. See ENC. SOC. SCI. *loc nom.* "social control."

134. Power is the capacity to foreclose alternatives and require desired action from some other person. See Bierstedt, *An Analysis of Social Power*, 15 AM. SOC. REV. 730

The growing power of "private" organizations in our society has posed a problem for courts and commentators; as nominally private institutions have come to exercise many of the functions traditionally allocated to government, a need has arisen to protect basic liberties against these new centers of power. Where societal controls do not function satisfactorily, it falls to the law to use its skills to reestablish effective pressures limiting arbitrary power. Society has recognized that private institutions possess potential for arbitrary coercive power so great as to have grave social effects. Consequently, landmark cases [135] and imaginative commentators [136] have suggested that those private

(1950). Within a "market," by definition, there are always alternatives and no participant has "power." Only when power exists must it be regulated.

Compare the underlying rationale of the Civil Rights Cases, 109 U.S. 3 (1883) that individuals have power only to "invade" rights but that only the State has power to "destroy" rights. The individual's actions can be limited by the injured party's ability to go elsewhere, and to seek redress from the State; only the State has the capacity to injure without remedy, so it is only against the State that "constitutional" limitations are needed.

See also Goldhamer & Shils, *Types of Power and Status*, 45 AM. J. Soc. 171 (1939). "A person may be said to have *power* to the extent that he influences the behavior of others in accordance with his own intentions." One might add, "even against their will." GERTH & MILLS, CHARACTER AND SOCIAL STRUCTURE 193-95 (1953). Simmel, though, has pointed out that, barring brute force, power is not actually exercised *against* the will of the dominated, rather the stronger person so structures the alternatives that the subordinate *chooses* to obey, rather than suffer the consequences. Subordination "only demands a price for the realization of freedom—a price, to be sure, which we are not willing to pay." SIMMEL, THE SOCIOLOGY OF GEORGE SIMMEL 181-86 (Wolff ed. 1950); to the same effect, BARNARD, THE FUNCTIONS OF THE EXECUTIVE 161-84 (1938); see also Kaysen, *How Much Power? What Scope?* in THE CORPORATION IN MODERN SOCIETY 85 (Mason ed. 1959).

135. Marsh v. Alabama, 326 U.S. 501 (1946) (company town); Smith v. Allwright, 321 U.S. 649 (1944) (white Democratic primary); Terry v. Adams, 345 U.S. 461 (1953) (white Jaybird Democratic Party). *Cf.* Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956) (union shop agreement under Railway Labor Act).

136. Compare, Justice Douglas: "Should not the corporate giants be considered as "states"? Is it not naive to think of them as "persons"? Douglas, Book Review, The N.Y. Times Book Review, Oct. 22, 1961, p. 3, col. 2.

> As a beginning, we can set out the following propositions: (1) The Constitution was framed on the theory that limitations should exist on the formal exercise of power in government but not on power exercised unofficially. (2) The essential problem of individual liberty, however, is one of freedom from arbitrary restraints and restrictions, wherever and however imposed. (3) The Constitution should be so construed as to apply to arbitrary applications of power against individuals by centers of private government. (4) The main flow of group decisions in the factory community would not be thrown unto litigation or controversy by such constitutional construction, but only those which directly and substantially affect an individual. (5) It would take only a slight modification of present constitutional doctrine to effect such a constitutional construction.

MILLER, PRIVATE GOVERNMENTS AND THE CONSTITUTION 12 (Occasional Paper for Center for the Study of Democratic Institutions, 1959). See also BERLE, ECONOMIC POWER AND THE FREE SOCIETY 17-18 (1957); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion through Economic Power*, 100 U. PA. L. REV. 933 (1952); Friedmann, *Corporate Power, Government by Private Groups, and the Law*,

organizations exercising effective power over vital segments of social life be subject to the same constitutional restrictions as public governments. Between these polar positions of treating powerful institutions as either "private individuals" or "public governments," a new law of "private governments" is gradually being developed by legislatures,[137] courts,[138] and writers.[139] Recognizing the principles that the exercise of organizational autonomy in decision-making must be tempered with public responsibility, and that public responsibility is measured by the nature of the organization involved and the deprivation it inflicts, courts have applied or invoked controls appropriate to each institution. For example, the power of unions over both members [140] and non-members,[141] the power of political parties over voters,[142] and the power of company towns over residents and visitors [143] have all been said to have so great an unregulated potential for arbitrary deprivation that judicial relief must be afforded to the injured.

The university shares the characteristics of market autonomy and potential for deprivation which have led to increased judicial supervision of private groups. Decisions made by the school can affect the student as immediately and conclusively as decisions by government itself. The deprivation inflicted

---

57 COLUM. L. REV. 155, 176-77 (1957); Lantham, *The Commonwealth of the Corporation*, 55 NW. U.L. REV. 25, 35 (1960); Malick, *Toward a New Constitutional Status for Labor Unions: A Proposal*, 21 ROCKY MT. L. REV. 260 (1949); Miller, *The Constitutional Law of the Security State*, 10 STAN. L. REV. 620, 655-56 (1958); Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203, 234-38 (1949); PEKELIS, LAW AND SOCIAL ACTION 91-128 (1950); Wilson, *Antitrust Policy and Constitutional Theory*, 46 CORNELL L.Q. 505, 524-31 (1961).

137. *E.g.*, Labor-Management Reporting and Disclosure Act, 73 Stat. 535 (1959), 29 U.S.C. §§ 501-04 (Supp. III, 1959-61) (government by union of its member); Auto Dealer's Day in Court Act, 15 U.S.C. §§ 1221-24 (Supp. V, 1961) (government by auto manufacturer of its dealers).

138. See cases cited notes 94-128, 135 *supra*, 140 *infra*.

139. *E.g.*, ARNOLD, FOLKLORE OF CAPITALISM 110-13, 215 (1937); *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963); Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U.L. REV. 38 (1960); Schwartz, *Institutional Size and Individual Liberty: Authoritarian Aspects of Big Business*, 55 NW. U.L. REV. 34 (1960); Selznick, *The Sociology of Law*, 12 J. LEG. ED. 521, 526 (1960).

For discussions with special reference to labor unions, see, *e.g.*, Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs*, 44 ILL. L. REV. 425, 631 (1949); Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175 (1960); Summers, *Disciplinary Powers of Unions*, 3 IND. & LAB. REL. REV. 483 (1950); Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049 (1951); Wellington, *The Constitution, the Labor Union and "Governmental Action,"* 70 YALE L.J. 345 (1960); Wirtz, *Government by Private Groups*, 13 LA. L. REV. 440 (1953); Williams, *The Political Liberties of Labor Union Members*, 32 TEXAS L. REV. 826 (1954).

140. Syres v. Local 23, Oil Union, 350 U.S. 892 (1956) (*per curiam*).

141. Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

142. Smith v. Allwright, 321 U.S. 649 (1944) (white Democratic primary); Terry v. Adams, 345 U.S. 461 (1953) (white Jaybird Democratic Party).

143. Marsh v. Alabama, 326 U.S. 501 (1946).

through expulsion is severe in itself and has severe consequences.[144] It may be inflicted arbitrarily, or on the basis of activity which our society considers most important to be preserved from interference, such as religious and political behavior.[145] Moreover, the college's potential to exercise coercion is substantially unrestrained by market pressures—the student may be said to have freedom to contract but in fact has only freedom to adhere. When he "chooses" a university, he must choose a relationship on an "all-or-nothing" basis. The school, unlike the social club, functions as a multi-purpose institution; to obtain academic advantages, the student may be required to suffer social disabilities which, like "unconstitutional conditions" to government programs, would not ordinarily survive "market" pressures.[146] These characteristics suggest the need for abandoning the fiction that the university, any more than the labor union, is a wholly "private" institution, and suggest the consequent need for adopting more stringent attitudes on review.

B. *The Possibility of Judicial Inquiry*

Judicial evaluation of conflicting school and student claims is particularly appropriate because satisfactory legislative solutions are not to be expected. Students have small political influence, for they may be out-of-staters, transients, or minors. Universities, on the other hand, have established legislative channels of contact, and political power as employers, landowners, and investors. Consequently, the legislative process will probably continue to reflect the imbalance of power and fail to establish protections for the weaker party, the non-voting students, whose weakness is the cause of their need for governmental protections. Therefore, the courts properly may apply to the university-student situation the principle that the courts' constituency consists of those not represented in the political branches[147]—that it represents those otherwise helpless, an idea as old as the chancellor's equitable jurisdiction to protect minors.[148]

While objection might be made to the institutional costs to courts if they are required to handle a host of claims, each *de minimis* in value, these objections do not necessarily apply to discipline cases. Of the students who are expelled, the number willing to bear the expense of litigation has never been great; nor is there reason to think that colleges would, by failing to conform their policies to court-imposed standards, produce a flood of litigation. And no matter how many suits are brought, the value of the items in controversy is great,[149] and —as a court long ago observed—students have a right no smaller than that

144. See notes 4-12 *supra* and accompanying text.

145. See notes 13-16 and 71 *supra.*

146. Compare works cited note 139 *supra.*

147. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). See Shapiro, *Judicial Modesty, Political Realty and Preferred Position*, 47 CORNELL L.Q. 175, 198-200 (1962).

148. See Eyre v. Shaftsbury, 2 P. Wms. 103, 118, 24 Eng. Rep. 659, 664 (1722); JACOBS & GOEBEL, CASES ON DOMESTIC RELATIONS 880 (4th ed. 1961).

149. See notes 11-12 *supra* and accompanying text.

of other citizens to have their interests adjudicated in the courts.[150] Whether the court's role in student discipline cases is conceived of as the giving of relief for an intentional injury, as a balancing and harmonizing of interests, or as a review for fundamental fairness of semi-autonomous decisions, the function is one in which the court has long experience. Indeed, if the discipline problem is conceived of as a reconciliation of institutional authority and individual rights, then no other institution in society is more competent to play such a role than the courts.

C. *The Need for Factual Inquiry*

The conclusion that courts should provide a more effective review of university expulsions than they now do leads to the question of what form the court's analysis of facts and law should take. Judicial analysis of discipline cases by analogy to commercial contract, to parents, or to the state is inadequate. As discussed in Part I, the usual use of these analogies—in truncated form—hides the great freedom to reach alternative results which they provide. But even where the full possibilities implied in each of the analogies is appreciated by the court, the analogies cannot satisfactorily guide a court to a desirable result by the force of their inherent logic. Each analogy provides a legal vocabulary in which conflicting solutions of basic questions can be expressed. And the rules purporting to govern the analogous field may turn on terms relatively devoid of content—such as "inherent," "reasonable," "arbitrary," "implied," or "abuse of discretion." Even should it appear that a doctrinally-dictated result ensues from an analogous fact-situation, the judge applying such a result to school discipline runs the risk of substantive irrelevancy; the unique character of the university as an institution makes translation of policies difficult. And were a judge merely to purport to find decision in a school case to be dictated by the use of analogy, the masking of other factors actually influencing the decision would impair the ability of counsel and commentators to formulate reasoned arguments on the determinative issues.

Proliferation of the purpose of a rule of law, by borrowing it from an analogous fact-situation, is an acceptable mode of judicial procedure where the court can be clear about the content of the rule, the relevance of its purposes to the case at hand, and the effect on competing interests of the application of the rule. But only an understanding of the fact-situation before it —the needs and capacities of student, school, and court in relation to discipline —can satisfactorily guide the court in its choices among competing analogies, and among conflicting results possible within each analogy. The needs and capacities of school, student, and court must necessarily play the primary role in deciding the legal relationships to exist among them. Analogy may then be used as an instructive, but incidental, mode of weaving results into the fabric of the law. As a legitimating step for prior conclusions, it must be preceded by careful inquiry into competing functions and the fact situations in which they operate.

150. Commonwealth *ex rel.* Hill v. McCauley, 2 Pa. County Ct. 459 (1886); 3 Pa. County Ct. 77 (1887).

D. *The Question of Justiciability*

Given the fact of an expulsion brought to the court's attention by litigation, a court will ask itself how it may best proceed. A logical first question is that of justiciability: is the discipline a penalty, and has the court the institutional competence to evaluate the manner of, or reasons for, its application? If so, the court will wish to identify those factors present in the situation which are relevant to its decision on reinstatement and will need appropriate legal standards and presumptions by which to determine the cumulative effect of those factors.

In the great majority of cases expulsion will constitute a penalty. As contrasted to probation, suspension, and other lesser measures, expulsion involves a complete severance of relationship. Therefore it almost always reflects a decision to favor the interests of the school or some other parties, rather than the "best interests of the student."[151] As a result, schools would appear unable to assert (as they might for lesser forms of discipline) that the purpose of their action was not punishment.

In excluding the student, the school may be seeking to further one of several institutional goals. First, it may be seeking to make its limited academic resources available to those who can make most effective use of them. Such exclusion, even if denominated expulsion, then signifies a judgment that the student can not satisfy the school's self-defined educational standards, and may not be a penalty. Second, the school may seek to preserve academic standards generally, by punishing those who trespass against canons of academic honesty. Expulsion then connotes that the student has so offended the behavioral standards of his calling as a student that he is not fit to continue in it, or in the professions to which it may lead. Here the likelihood is far greater that other schools will share identical standards and that expulsion will function as a judgment of unfitness for further education generally. Third, the school, as institution rather than as educator, may have self-protective goals—preserving order within itself, preserving relationships with geographic or financial communities upon which it depends, inculcating habits of self-enforcement of rules among its students generally—which on occasion require the excision of an offending student. Here expulsion expresses the institution's displeasure at student activity, whether to reduce the likelihood of disorder, to show concern for injury done to others, to protect reputation, to enforce caution in potential malfeasants, or merely to vindicate the school's authority.

The degree of judicial inquiry into expulsions depends also upon consideration of the institutional ability of courts to make reasoned assessments of school disciplinary situations. The judge, although skilled in rule application, is not an expert in matters of academic accomplishment and educational policy. Where the propriety of a decision turns upon questions of academic necessities, evaluation of scholarship, educational benefits, or the like, the relative superiority of the educators' expertise over the courts' seems to require judicial

151. The "polar star" of domestic relations law is said to be "the best interests of the child." See, *e.g.*, Maudlin v. Maudlin, 68 Idaho 64, 72, 188 P.2d 323, 327 (1948).

reluctance to undertake review of a decision—even one inflicting great deprivation. Colleges and many courts each have experience, however, in the character training of youth. Indeed, in matters of order, safety and reputation the court may have a wider experience than the school; in punitive discipline it is the court rather than the school that has a special expertise. A similar range of relative competence exists as to knowledge of the specific facts of a given case. If the college's decision was based on specific incidents, the college has no more advantage over a reviewing body with discretionary *de novo* jurisdiction than would a jury or fact-finding judge. If the college's action is based on a diagnosis of a student's total personality, on the other hand, its conclusions can be meaningfully reviewed only to the extent that an expert witness's could. This need for awareness of limitations upon judicial capabilities suggests that any inquiry by a judge must take into account the operative factors contributing to, or detracting from, his expertise.

More important than the probability that courts are unfitted to make educational decisions in deciding the proper relationship of the court to school and student is the university's legitimate interest in autonomy—the freedom to learn, the freedom to teach, the freedom to inquire, and the freedom to shape policies to fulfill its basic goal. It is assumed, of course, that the university's central goal is the education of its students; within broad limits, the definition of education must be established by the school's own conception of its mission within the world of knowledge. While the latter is an interest of the university as an institution, justified by our society's value on pluralism, freedom to learn, to teach, and to inquire are part of the academic freedom of teachers and students, necessary if they are to perform their educational functions.[152] Any infringement by courts, by legislatures, even by university nonteaching staff, on academic freedom would, obviously, be undesirable. Judicial review of academic expulsions, therefore, should be as limited as possible, to avoid invasion of the classroom. But judicial review of expulsions based on school concern with order, safety, or reputation would not usually pose a threat to the autonomy of the faculty, nor present a problem of competency to reviewing courts. And the school's institutional autonomy in shaping the policies by which it seeks its goal will rarely be called into question in expulsion cases. Moreover, respect for school autonomy does not require judicial abstention; contrary policy may be of superior weight, as the *Flag Salute Cases*[153] demonstrate.

"Educational" expulsions, for *extra*-academic reasons, *e.g.*, character training, would generally not present the same consideration of academic freedom.

152. "Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding, otherwise our civilization will stagnate and die." Sweezy v. New Hampshire, 345 U.S. 234 (1957) (*per* Warren, C.J.).

153. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), *overruling* Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

> Nor does our duty to apply the Bill of Rights to assertions of official authority depend upon our possession of marked competence in the field where the invasion of rights

However, another factor may weigh against judicial review of certain of these expulsions. A school may have genuine therapeutic purposes when it requires a student to leave despite the fact that he has satisfied minimal academic requirements. For many private colleges, "education" includes as central to its purpose such non-academic aspects as character training, and a student's character development may thus be important to the school's determination of a student's continued fitness to remain. If a school's declarations, practice and procedures—such as psychotherapeutic inquiry [154]—show that such are the reasons for a given expulsion,[155] the court ought properly to limit its review to avoid exceeding its competence or infringing on vital interests of the school.

Where expulsions are based on academic dishonesty, the court's inquiry may be conditioned on the particular academic crime involved and the manner in which the school deals with it. Thus, where the decision to expel is made by academic personnel, and is based upon such an academic judgment as whether or not material is plagiarized, a court may defer to special competence much as it would in the case of academic failure. But where an allegation of crime—even one related to academic performance—is dependent on non-academic facts, as cheating on examinations may be, or is established by the school in a manner not involving academic judgment, the court is competent to review the appropriateness of the school's decision. The school has, it must be admitted, greater concern with academic than with other forms of student misbehavior. But unless the decisions it makes require academic expertise, this concern ought not to preclude a court from judging for itself. Evaluation of fact-finding to determine the occurrence of crime is standard business for the courts.

When the school expels to safeguard its institutional interests, rather than to achieve its educational goals, court review is particularly appropriate. In serving these interests the school is unlikely to have the special competence or concern which it enjoys in its central role. And, since it is only the school-student academic relationship in which the two may be said to direct their activities towards a shared goal, when a dispute between student and school involves other roles they play, their legitimate interests may conflict greatly. Thus, the unlikelihood that the school will reflect adequately the extent of the student's legitimate interests necessitates court review to achieve such a weighing. Here, especially, the school is judge in its own cause.

In some cases, the court ought properly to grant review because of characteristics of the effect on the student, regardless of alleged educational characteristics of the university's act. Such need for judicial inquiry is established when it is claimed that the school has infringed such basic interests as freedom

---

occurs. . . . We act in these matters not by authority of our competence but by the force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

319 U.S. at 639-40.

154. See text at notes 188-90 *infra*.

155. See text accompanying note 172 *infra*.

of speech—both to speak and to hear—freedom of the press, freedom of assembly, right to political activity, freedom of religion, or the right to privacy. Our society depends on its courts to make the ultimate decision as to the propriety of such infringements—a responsibility which is not to be delegated to university officials, even where they claim superiority founded upon educational expertise.[156]

Student Interests v. School Interests: Reasonable Rules Reasonably Applied

Thus, effective judicial review seems called for whenever a balance of the capabilities of schools and courts reveals that schools are not the clearly superior arbiters of the students' fate. As the case law establishes, it is by the fundamental standard of reasonableness—requiring both reasonable rules and reasonable application—that a court evaluates the expulsions over which it exercises review.[157] How should a court go about establishing the content of this standard?

Some of the cases involving schoolmaster discipline hold that the only behavior outside the school which may be regulated is that with a direct and immediate effect on the classroom or the teacher-student relationship, such as the destruction of schoolbooks or the ridiculing of a teacher.[158] Similarly, some student groups and educators have suggested that, except to the extent that such student behavior interferes with the university's academic functioning, it should not be regulated by the school.[159] Thus, it is argued, the student would

156. Note 153 *supra.*

157. See text at notes 68-70 *supra.*

158. See, *e.g.*, Lander v. Seaver, 32 Vt. 114, 121 (1860).

159. The National Student Congress, composed of representatives of the student governments of the major part of American colleges, has adopted this "Basic Policy Declaration" on *In Loco Parentis*:

> Equally important are the effects of *in loco parentis* doctrine on the changing student. Paternalism in any form induces or reinforces immaturity, conformity, and disinterest among those whose imagination, critical talent and capacities for integrity and growth should be encouraged and given opportunity for development.
>
> . . . [Admittedly, w]e can see justification and even a necessity in the enforcement of such intellectual discipline as is found in a core-curriculum, in such social disciplines as is necessary to maintain order in the classroom. . . . However, those forms of discipline which can be justified on the basis of this formula are few and scarce, and the danger is great that illegitimate paternalism will be confused with proper control.

U.S. NATIONAL STUDENT ASSOCIATION, CODIFICATION OF POLICY, 1961-62, p. 31.

The restriction of university interest to the academic has been urged by Robert Hutchins, former Chancellor of the University of Chicago and Dean of the Yale Law School, as a matter of effective allocation of resources:

> . . . The university gets involved in trying to chaperone its students and soon finds that it's spending its money and, what's more important, its attention on the job. And, since there's only a limited amount of time, intelligence, and money around a place, it has to be carefully used.

U.S. NATIONAL STUDENT ASSOCIATION, IN LOCO PARENTIS, pp. II-1, II-4 (Johnston 1962).

be allowed the personal freedom necessary for his self-education, and the school would be able to concentrate its limited resources on its central tasks.[160] The ordinary community police and courts would be sufficient to protect society against the misdeeds of students, as against those of other persons; students accused of crime would have the protections of trial at common law before punishment would be imposed. This suggested standard may not sufficiently recognize the university's own status as a community; but if it is rejected on this basis, recognition of the university's community status raises the need for other guides for decision.

When the capacity of or need for a court to afford effective judicial review of an expulsion is clear, it must judge the propriety of the expulsion by evalating and comparing the competing interests of the school and student, to determine the minimal requirements—both procedural and substantive—to be met by the school. The substantive requirements imposed on school expulsions should vary with the limitation on conduct occasioned by obedience to a regulation, and the limitation occasioned by punishment for disobedience of a regulation, both of which are deprivations of a substantial order. In addition to considering these deprivations and the interests of the school, a court should also scrutinize the procedures by which the regulation was established and the student expelled. The reinstatement of an expelled student on procedural grounds avoids explicitly questioning the freedom of the school to achieve its substantive goals despite conflicting student interests;[161] such a judicial technique allows a court to dispose of a case on the issues as to which it has most competence, and also safeguards the student by dictating that school goals be achieved in accordance with established minimal safeguards. In the discussion that follows, the school infringements on a student's freedom of expression, on his other especially valued liberties, and on his activities in general, will be considered in turn, followed by a discussion of factors governing the reasonableness of proceedings for expulsion.

160. *Ibid.*

161. As to the propensity to reverse on procedural rather than on substantive grounds, the following Fable, by Ambrose Bierce seems in point:

"THE PARTY OVER THERE

A Man in a Hurry, whose watch was at his lawyer's, asked a Grave Person the time of day.

"I heard you ask that Party Over There the same question," said the Grave Person. "What answer did he give you?"

"He said it was about three o'clock," replied the Man in a Hurry; "but he did not look at his watch, and as the sun is nearly down I think it is later."

"The fact that the sun is nearly down," the Grave Person said, "is immaterial, but the fact that he did not consult his timepiece and make answer after due deliberation and consideration is fatal. The answer given," continued the Grave Person, consulting his own timepiece, "is of no effect, invalid and void."

"What, then," said the Man in a Hurry, eagerly, "is the time of day?" "The question is remanded to the Party Over There for a new answer," replied the Grave Person, returning his watch to his pocket and moving away with great dignity.

He was a Judge of an Appellate Court.

A. *"Reasonable Rules": Limits of Substance*

Expulsions are sometimes imposed where the form or content of student self-expression violates school policy.[162] But liberty of expression occupies a preferred place in our scheme of values. The policy considerations that require its protection against government interference suggest the necessity of its protection from interference by universities. Infringement on this freedom is not to be easily tolerated merely because it emanates from private sources of oppression.[163] In the case of the university, society's interest in free and open debate, including the rights of assembly, association, and publication [164] and the right of all to hear and speak even unpopular ideas [165] is particularly strong—the university is needed as a source of the new ideas which a democracy constantly requires.[166] Thus, relevant legal doctrines, such as the doctrine

162. See cases cited note 71 *supra.*

And expulsions are but one expression of a campus environment restricting free thought and expression. The New York Times concluded after a survey of 72 major American colleges that

> [a] subtle, creeping paralysis of freedom of thought and speech is attacking college campuses . . . limiting both student and faculty in the areas traditionally reserved for free exploration of knowledge and truth. They take a variety of forms.

N.Y. Times, May 11, 1951, p. 29, col. 8.

163. The union member has been held to have a right under statutory "free speech" protection to be free of union discipline in speaking his mind and spreading his opinions on union matters. Because "the union is not a political unit to whose disinterested tribunals an alleged defamer can look for an impartial review of his 'crime,'" union authorities are restricted to their remedy in the courts if the member oversteps into the area of libel. Salzhandler v. Caputo, 316 F.2d 445 (2d Cir. 1963).

164. A survey of 141 colleges and universities with enrollments over 500 reveals that in 85% of the institutions without accredited schools of journalism, it was the administration policy to supervise the content of the campus newspaper. Among the colleges with accredited schools of journalism, where the newspaper is a school "laboratory," only 68% reported that student editors were supervised. 29 JOURNALISM QUARTERLY 62 (Winter 1952). Among the schools which did not supervise the newspapers, such indirect controls as administration appointment of editors were sometimes employed. *Id.* at 65. See also Editor & Publisher, Sept. 27, 1952, p. 48.

Editors attending the First Student Editorial Affairs Conference, sponsored by the U.S. National Student Association, listed the following forms of abridgment of the freedom of the press of college publications as currently being practiced: confiscation of student newspapers because of the publication of controversial material; suspension, expulsion, or threats thereof against student editors because of the publication, actual or proposed, of controversial material; censorship of newspaper content by faculty, administration, student government, civil or ecclesiastical authorities; financial pressure to censor articles and editorials on controversial matters; "inordinate" and "excessive" social pressure to prevent publication of particular articles or opinion. 85 SCHOOL & SOCIETY 361 (1957). Post-publication retaliation ranges from reprimand to expulsion. 61 COLUMBIA UNIVERSITY BULLETIN, Number 25, pp. 171-72.

165. A survey of state supported institutions indicated that 175 schools—over 42% of those polled—did not allow their facilities to be used by political speakers. Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations,* 111 U. PA. L. REV. 328 n.1 (1963).

166. The university student should be exposed to competing opinions and beliefs in

of university "reasonable rules," should be construed as to further society's interest in freedom of expression, by preventing university incursions upon student freedoms.

And the university and the students themselves have special interests in freedom of expression. Such free discussion and debate is not only necessary for the proper functioning of our political and social system, it is also regarded as an essential catalyst in the process of individual fulfillment. The essence of the tradition of a liberal arts education is the freedom to examine all ideas, whatever their current state of acceptability. Even if society did not value freedom to hear and to speak, those liberties would be a central interest of the student.[167] Protection of speech prerogatives is called for, *a fortiori*, where school

---

every field, so that he may learn to weigh them and gain maturity of judgment. . . .

Whatever criticism is occasioned by these practices, the universities are committed to them by their very nature. To curb them, in the hope of avoiding criticism, would mean distorting the true process of learning and depriving society of its benefits. . . . It would deny society one of its most fruitful sources of strength and welfare and represent a sinister change in our ideal of government.

Statement, Association of American Universities, March 24, 1953. EMERSON & HABER, POLITICAL AND CIVIL RIGHTS 1070, 1073 (1958). The AAU is the national conference of college presidents.

Harvard University has proven the workability of the absence of campus censorship in higher education. . . .

The standard which should be applied in both public and private institutions is this: any written idea of discussion or speaker should be permitted full exposure on the campus, so long as the basic purpose of the exposure is not to violate the law. Anything short of this, we think is inimical to a free society. . . . The constitutional principles of our democracy, as well as the basic strength of our society, require unfettered free inquiry in all institutions of higher learning. . . . The most important "market" [for ideas] is the university campus. All who are concerned with academic freedom—administrators, teachers, yes, and lawyers and judges, too—should fight every attempt, however well-intentioned, to block unpopular speakers, discussions and writing for our institutions of higher learning.

Report, Committee on the Bill of Rights, the Association of the Bar of the City of New York, 1962. See also AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES 15 (1961).

For judicial recognition of this special level of interest, see, *e.g.*, Wieman v. Updegraff, 344 U.S. 183, 197-98 (Frankfurter, J., concurring); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (per Warren, C.J.); Shelton v. Tucker, 364 U.S. 479, 487 (1960).

167. The college which wishes to set an example of openminded inquiry in its classrooms will defeat its purpose if it denies the same right of inquiry to its students outside the classroom—or if it imposes rules which deny them the freedom to make their own choices, wise or unwise. Limitations on the freedom of students are not then to be seen as simple administrative decisions which adjust the school to the prevailing climate of public opinion. The college's policy vis-a-vis its students goes to the heart of the condition necessary for adequate personal growth and this determines whether an institution of higher education turns out merely graduates or the indispensible human material for a continuing democracy. . . .

AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES 4 (1961).

The notion that education consists in the authoritative inculcation of what the teacher

charters or other controlling documents stress the need for devotion to unfettered inquiry and free expression.[168]

Applying the experience it has gathered in protecting free expression, a court might strike down as unreasonable any regulation which has the effect of depriving students of some or all of that freedom. Thus, regulations which prohibit the existence of political organizations, or prohibit all campus meetings on political subjects, or prohibit speakers of an unpopular viewpoint from speaking, would be unreasonable.[169] On the other hand, regulations which specify the time and place of meetings, modes of registering activities and publicizing them, and similarly non-burdensome housekeeping rules to promote safety, order, and convenience, would seem entirely proper.

---

deems true may be logical and appropriate in a convent, or a seminary for priests, but it is intolerable in universities and public schools, from primary to professional.

Inaugural speech of President Eliot of Harvard University, PRIMER OF INTELLECTUAL FREEDOM 15 (Harvard Univ. 1949).

An ideal of the liberal arts university tradition was sketched by Thomas Jefferson, founder of the University of Virginia, in a letter to prospective faculty members stating that it would "be based on the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate error so long as reason is free to combat it." BARTH, THE LOYALTY OF FREE MEN 203 (1951).

168. See, *e.g.*, the declaration of purpose of the University of Wisconsin:

WHATEVER MAY BE THE LIMITATIONS WHICH TRAMMEL INQUIRY ELSEWHERE, WE BELIEVE THAT THE GREAT STATE UNIVERSITY OF WISCONSIN SHOULD EVER ENCOURAGE THAT CONTINUAL AND FEARLESS SIFTING AND WINNOWING BY WHICH ALONE THE TRUTH CAN BE FOUND. Bronze tablet in the wall of the main building of the University of Wisconsin.

PRIMER OF INTELLECTUAL FREEDOM 65 (Harvard Univ., 1949); college charters in BARTLETT, *op. cit. supra* note 115.

169. The student government, student organizations, and individual students should be free to discuss, pass resolutions upon, distribute leaflets, circulate petitions, and take other lawful action respecting any matter which directly or indirectly concerns or affects them.

AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES 4 (1961).

> Students should enjoy the same right as other citizens to hear different points of view and draw their own conclusion. . . .

Id. at 7.

> No disciplinary action should be taken by the college against a student for engaging in such off-campus activities as political campaigning, picketing or participation in public demonstrations, provided the student does not claim without authorization to speak or act in the name of the college or one of its student organizations. In their off-campus life, students should not be shackled by college control, nor should the college be held responsible for the off-campus activities of its individual students. . . . When students choose to participate in activities that result in police action, such as demonstrations against segregation, the civilian defense program or nuclear tests, it is an infringement of their liberty for the college to punish such activity.

Id. at 11.

The fact that student expression off-campus is not so infringed would not save the campus prohibition from unreasonableness, any more than a community's limitation of a

Between these two poles would fall regulations intended to promote some legitimate university goal, extrinsic to expression, but which had a necessary effect of severely limiting expression. An example of such a rule would be a requirement that a student on probation not participate in extra-curricular activities, including off-campus political meetings.[170] To determine the propriety of such a requirement, the court might weigh the interests involved, as well as the degree of their involvement: a school rule established for some purpose ancillary or peripheral to the school's self-declared central goal represents a lesser school interest than a rule directly promoting that central goal.[171] A prohibition on controversial speakers imposed to protect school's good relations with its geographic or financial communities effects an interest less central to the college's purpose than, perhaps, a ban of novels stressing sexuality by a college dedicated to special standards of morality. Similarly, the school's interest in guidance of the educational experiences of its students may be more directly involved in a limitation of unauthorized tutorship, than unauthorized publications; of visiting professors, than student-invited speakers; of unauthorized study-groups, than clubs or gatherings without permission. And faculty control of the *professional* standards of a school publication—whether a newspaper of a journalism school or a poetry magazine of an English department—more directly involves a school's central purposes than university control of

---

burden on religious freedom to its borders saves it from unconstitutionality. *Cf.* Marsh v. Alabama, 326 U.S. 501 (1946); Hague v. CIO, 307 U.S. 496 (1939).

Students at English universities have claimed, and apparently regularly receive, the rights

(1) To free expression of opinion by speech and Press.
(2) To organize meetings, discussions, and studies on all subjects within the University precincts.
(3) To belong to any organization, whether cultural, political or religious.
(4) To participate to the full in all activities outside the University, and to collaborate with extra-University organizations.

NATIONAL UNION OF STUDENTS, CHARTER OF STUDENTS' RIGHTS AND RESPONSIBILITIES (1940). Compare "Student Bill of Responsibilities and Rights," in U.S. NATIONAL STUDENT ASSOCIATION, CODIFICATION OF POLICY 1962-63, pp. 38-40. But for the practice of some American schools, see note 164 *supra.*

170. See the discussions of Zarichny v. State Board, at note 71 *supra,* and Steier v. Board of Higher Educ., at note 6 *supra.*

171. Of course, there is always the public relations problem—does the John Birch unit or the Khrushchev Fan Club of a given college represent the college? Of course not. The p.r. problem is only avoided by pretending that there are not kooks of this kind on campus. It is met by educating the public that It Takes All Kinds and any college is likely to have its share.

The point, I guess, is that a university is not a religious community, a political community, or a social fellowship: it is an intellectual community. On religious, political, social grounds no community is possible; therefore no group organized along these lines "represents" the university. The public should be educated to know this.

Comments in response to a survey of leading educators on *in loco parentis.* Letter, John Cogley to U.S. National Student Association, Sept. 16, 1961. (All responses on file in library of, and available from U.S. National Student Association.)

publication content for reasons of institutional self-protection. Moreover, if an interest can be served by alternative measures which are less depriving than the challenged regulation, then that regulation cannot be considered required by the interest.

Principles similar to those suggested for speech cases might be found to govern questions of freedom of religion. If imposed only for an ancillary administrative purpose of the school, no limitation on a student's religious freedom would be reasonable. If, however, a school's central purpose included religious or moral education, then the school's freedom of religion would seem to justify supervision of these aspects of the student's right and the exclusion of students who violated religious canons. But where a student's misdeed was religious in nature, consideration of his religious freedom as against the school's would seem to require that expulsion be phrased so as to operate only as an exclusion of one no longer qualified for religious companionship, rather than as the utmost sanction of dishonorable expulsion, expulsion of a sort likely to bar professional career paths, or denial of a degree already earned.[172] To establish that a religious requirement was indeed central to a school's purpose, a court might rely upon its representations in catalogs and public statements, the warnings of enforcement of religious rules that it made to its students, its past enforcement of such rules, and its other activities. A school could not have a religious purpose, of course, if that were prohibited in its charter, by its founders, or in other authoritative instructions, as is the case in "state" schools.[173]

When a valuable student interest other than freedom of expression is limited by university action, even regulation for administrative institutional purposes arguably might be found to meet the standards of "reasonable rules."[174] Out of respect for the school's autonomy in determining its own goals, the court

172. Arguably, on the same principle of exclusion with minimum deprivations, such a student should not be expelled in mid-semester, but instead required to transfer after completion of courses then in midcourse, and perhaps restricted to minimum campus contacts in the interim period.

On this analysis, the St. John's University expulsions for participating in a religious civil marriage ceremony were unwarrantedly severe. Three seniors were expelled in mid-semester; the fourth expelled had already completed all coursework towards the degree. See note 7 *supra* and note 173 *infra*.

173. Applying this analysis to Carr v. St. John's Univ., 34 Misc. 2d 319, 231 N.Y.S.2d 403, *rev'd*, 17 App. Div. 2d 632, 231 N.Y.S.2d 410, *aff'd mem.*, 12 N.Y.2d 802, 235 N.Y.S.2d 834 (1962), it is doubtful whether the school was a "religious" one under the test here used. Non-Catholics were admitted to the university community as students; indeed, the school seems never to have filed the statutory certificate which would have declared it a religious school authorized to refuse admission on religious grounds. See N.Y. Educ. Law, § 313. Thus the school was not one which could justify exclusion of the non-orthodox out of fear of contamination by the non-orthodox. St. John's University justified the expulsion because of the "scandal" the civil marriage had caused, but "scandal" is a term of art in canon law referring to a reaction of the Catholic community to a major sin of a Catholic—expelling the students could not have "avoided a scandal" in the sense of keeping the incident secret. The conclusion seems to be that the expulsion was intended as a retributive or deterrent penalty, and thus unreasonable under the analysis here presented.

174. *But see* note 159 *supra* and accompanying text.

might require no more of a connection between regulation and school goal than the minimum tests of relevance and rationality defined by jurists under the rubric of substantive due process.[175] These other interests, which have been termed the "common rights" or "liberty" of the citizen, would include such social freedoms as the right to marry, the right to choice of residence, and the right to privacy in name, person, dwelling and personal possessions.[176]

Racially discriminatory regulations, and expulsions used to enforce them, may similarly be evaluated on the basis of the interests of student, school, and society.[177] Such school actions are demeaning to both Negro and white students; insult to personal dignity would be sufficient at common law to destroy the school's privilege to punish. The courts now also recognize that racial slights render education more difficult; the interests of student as student, and of university as educator, would therefore seem to require the invalidation of racial expulsion. Though some schools might choose to teach the perspective of discrimination in their classes or on their campus, overriding public policy suggests that racially biased institutions, unlike religious schools, could not successfully invoke the societal interests in pluralism and school autonomy to justify expulsions perpetuating the policies of discriminatory school founders or faculty.[178] As in the case of religious regulations, this issue has been closed for state schools.

A third range of student interests imposed upon by school regulation consists of those beyond the range of the common rights or liberties, including behavior identified by society as well as the university community as contrary to public welfare. Where such conduct occurs, it may betray a greater need for institutional discipline than is present when violations of a less anti-social nature take place; moreover, the university, because of the destructive nature of such acts, has a greater need to express disapprobation. Since conduct contrary to the

175. If there is rational justification for the expulsion in the college's orderly functioning or its socially approved goals as an educational institution, the dismissals will not be condemned as arbitrary. . . . Judicial review was strictly limited to the scope of the regulation, its reasonableness, and the *bona fides*, not the wisdom, of the discretion exercised under it. The approach is in essence one of substantive due process.

Jacobson, *The Expulsion of Students and Due Process of Law—The Right to Judicial Review*, 34 J. HIGHER ED. 250, 253 (1963).

When deciding on the validity of the act of a "private government" under this test two factors distinguishing the test from that applied to legislative decisions are that the initial decision-maker whose choice is being reviewed was not a public official sworn to consider the general good, and that the concerns of the "private legislature" are not all-encompassing but limited. Though a court could find an enactment acceptable under this test if it was a valid means towards *any* of the goals a legislature might seek, in dealing with a "private government's enactment" a court must test the act first as a means towards the limited goals, and second, as a potential detriment to wider public goals.

176. See Pierce v. Society of Sisters, 268 U.S. 510 (1925).

177. McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

178. See Pennsylvania v. Board of Directors, 353 U.S. 230 (1957), *on remand*, Re Girard College Trusteeship, 391 Pa. 434, *cert. denied*, 357 U.S. 570 (1958). Clark, *Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979 (1957).

public welfare is of low value, arguably any countervailing university interest —as in protecting its reputation—would be sufficient to render reasonable the regulation of the behavior through the threat or actuality of expulsion.[170] But in defining such regulations, the schools' approximation to community standards must satisfy the court as genuine,[180] and the behavior regulated must occur within areas of time and space such that it is genuinely relevant to university community interests. It would seem that the university's interest would be far greater where behavior occurred in public rather than in private places, even the university's own dormitories.[181] And it would seem improper to expel a student for behavior of a kind commonly allowed by parents of children of his age or younger unless prohibition of the activity were of substantial importance to the central aims of the school.

B. *Reasonable Rules: Limits of Promulgation*

Additional problems are raised by otherwise permissible rules which are adopted after the student has acted in reliance on their absence, or are enforced on the basis of acts occurring before the student has received notice of them. The value placed on the school's autonomy might require that it be free to establish new behavior requirements to be enforced against its students. But enforcement of rules unpublished to the student, or enforcement of rules *ex post facto*, is contrary to our sense of justice.[182] And newly-established school rules which substantially alter the school's character or requirements may constitute a substantial undermining of the student's basis for choice of one university as against another. Thus, a procedural standard as to the promulgation of rules may be called for.

The first problem which arises in this regard is that of student knowledge of the present rule structure. Since the student population is a rotating one, with a new generation every four years, the codification of explicit rules may be the

179. *But see* note 159 *supra* and accompanying text.

180. A Cornell University report referred to

> the chronic complaint [that students] are not allowed to enjoy that reasonable measure of privacy in their social relations with one another that is now commonly extended in this country to young people, even of high school age.

Indeed,

> at Cornell, a 27 year-old graduate student was expelled for having shared an off-campus apartment with a young woman—not a Cornell student but an undergraduate at a teacher's college—during the summer months. . . . The student did not deny the charge but insisted that his off-campus life was his own business.

Hechinger & Hechinger, *College Morals Mirror Our Society*, N.Y. Times, April 14, 1963, § 6, p. 22, col. 1, p. 122, col. 2 ("Reflecting wide social changes in the postwar American scene, today's college generation is in open revolt against official codes of campus morality").

181. The common student request is for privacy in their social affairs. Universities, rather than merely regulating public behavior, often require that social entertainment be public—requiring that room doors be kept open or sending "inspectors" to check rooms. Hechinger & Hechinger, *supra* note 180, at 120, col. 2.

182. See Lambert v. People of California, 355 U.S. 225, 230 (1957); Hotch v. United States, 212 F.2d 280 (9th Cir. 1954); United States v. Aarons, 310 F.2d 341 (2d Cir. 1962).

only practical way of communicating the specific expectations of the university to its students. Such promulgation in itself, without disciplinary enforcement, would serve the valid purposes of setting norms for the edification and education of the students, and of condemning undesirable behavior without unnecessarily punishing any particular person to serve these purposes. It might not be necessary in all cases for rules to be written to give fair warning; perhaps such rules as those respecting academic honesty can be taken as understood, even with neither proof of fair warning nor proof of actual notice. Outside the purely academic rules, however, requirements can not with sufficient certainty be said to be known by students; proof of fair warning cannot be dispensed with. Nor should vague declarations about ungentlemanly behavior be said to have given adequate notice of the prohibitions, unless in the situation of application they have been universally acknowledged, detailed, and long-enforced without codification. In sum, the category of unwritten rules should be narrowly limited; full written notice is the preferred goal.[183]

As another means of meeting promulgation requirements, a school might secure actual consent of parent or student by obtaining signature to a copy of detailed rules at time of application, when the student still has the option of going to another school. Knowledge of the rules enforced at the several schools to which he might apply would enable the applicant to exercise some actual choice over the rules by which he was to be governed, and competitive pressures among universities might thus exert some limitation upon the rules enacted. Or parents or students could be presented by the university with a framework of regulations providing for alternative options.[184] The detailing of regulations in advance for student consent provides a standard of notice both just and

183. Regulations governing the behavior of students should be fully and clearly formulated, published, and made available to the whole academic community. They should be reasonable and realistic. Overelaborate rules that seek to govern student conduct in every detail tend either to be respected in the breach, or to hinder the development of mature attitudes. As a rule, specific definitions are preferable to such general criteria as "conduct unbecoming to a student" or "against the best interests of the institution," which allow for a wide latitude of interpretation.

AMERICAN CIVIL LIBERTIES UNION, ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES (1961).

But it has been suggested by one with a more therapeutic than disciplinary prospective that a detailed written code is overly stultifying to the growth of student responsibility, and that college rules should do no more than lay down broad principles. Interview with Dr. Robert Arnstein, Psychiatrist-in-Chief, Yale University, May, 1963.

184. For examples of the workings of such a system see, *e.g.*,

University Regulations.

Women Residents Only.

B. Curfews: Weekend nights, . . . Most parents specify on an annual permission card, "Overnight Permissions," but some parents prefer to write a personal note before each specific overnight permission.

E. Senior Privileges. . . . Senior Women shall be allowed extended evening privileges subject to the following conditions . . . They must have the previous written permission of their parents.

BRANDEIS UNIVERSITY STUDENT UNION HANDBOOK 1959-1960, pp. 95, 97, 99.

easily applied by courts. What is more, the university would benefit by seeking such uncoerced consent both by securing advance student knowledge of official expectations about his behavior, and by obtaining an annual guide as to the sort of supervision expected of it.

The conflicting student and school interests as to new rules may be reconciled by requiring that rules involving substantial change be promulgated sufficiently in advance of their enforcement to enable the student to conform his conduct to the realities of the new situation. For major changes, the school might be restricted to application against future students only, on the basis of notice included in or with the catalog sent to applicants, stating the purposes and details of school rules and requirements. For example, where a progressive experimental college decided to establish a new campus atmosphere reflecting Episcopalian tradition, students who had entered the school relying on its former character might legitimately have claimed that only the former rules be enforced as to them, while the new rules might be enforced against incoming students.[185]

As to less sweeping innovations of rules, or newly enforced rules, or new interpretations of rules, the adequate advance notice would be actual notice of the requirement before the act leading to the attempt at enforcement.[186] *Nulla poena sine lege* is termed a principle of natural justice because its violation, in any context, shocks the conscience of society. Proof of fair warning of rules, through detailed publication of requirements, might be taken in lieu of actual notice.[187] But the sudden enforcement without announcement of a change of school policy, of a purely formal or ritual rule, or one long sunken in desuetude should be taken as equivalent to enforcement of an unannounced rule. In sum, reasonableness requires not only that the rules conform to academic or school purposes, but also that they be known to the student at the relevant time for his decision on future conduct.

C. *Reasonable Rules: Limits on Enforcement*

The insistance upon suitable warning of the circumstances in which expulsion may be imposed is a procedural limit upon rule promulgation; the doctrine of reasonable application of reasonable rules seems to call for other procedural limitations, in which needs of both school and student are to be considered, to govern rule enforcement. An administrator might be impelled to suggest that the university's interest is in utilizing the most expedient route to expulsion. But those who administer a system must resist the tendency to confuse that which makes their jobs easier with that which furthers the goals of the institution. Both school and student share an interest in an inquiry which is fair, can

185. See Letter to the *Yale Law Journal* from Ralph S. Levine, Chairman, Community Council, Bard College, Jan. 15, 1962.

186. Even the appellate courts in *St. John's University* case, notes 7 and 173 *supra*, did not hold that notice of rules was not necessary, but that the students there had actual knowledge of them. See Jacobson, *The Expulsion of Students and Due Process of Law—The Right to Judicial Review*, 34 J. HIGHER ED. 250 (1963).

187. *Cf.* United States v. Merrill, 332 U.S. 380 (1947) and cases cited note 182 *supra*.

be seen to be fair, and can be relied upon to find facts accurately. The procedures to be required for any given form of expulsion will, of course, depend upon a multitude of factors, including the purpose of the university action and its anticipated effect on the student expelled. But an inquiry into procedures, a matter particularly within the understanding of courts, seems properly to extend to non-punitive expulsions as well as to punitive ones, despite the limitation of review "on the merits" which stems from the courts' lack of expertise in some areas of school concern.

Of several factors relevant to the issue of "reasonable" procedure at inquiries leading to expulsion, the first is the nature of the fact which the inquiry was intended to discover. Expulsion for reasons of punishment, deterrence, protection of others, or expiation of guilt, are properly based on a decision as to historical facts and require specific inquiry into those facts; expulsions for medical, psychiatric, or other therapeutic reasons will properly be based on a global picture of the entire student. While a general evaluation of a student's entire record may properly serve to mitigate the sanction that a specificly determined violation would otherwise demand, it would shock our notions of justice to allow the imposition of a sanction on the basis of such a general evaluation, in the absence of some specifically proven violation.

A second factor to be considered is whether the inquiry was undertaken by those persons and in that manner which are recognized as being appropriate to the form on inquiry. Different forms of investigation are appropriate to different matters—examinations to find academic achievement, hearings to ascertain the historical facts of human conduct, psychological or medical tests and interviews to evaluate danger to the environment. For an inquiry to be deemed a reasonable procedure on which to base the imposition of the major sanction of expulsion, a decision involving educational questions should be made by educators. One involving the school as a functioning community should be made by a cross-section of those concerned with its proper functioning—arguably this would include administrators, faculty, and students. A decision as to plagiarism should be made by scholars in that field, who have compared the similar works; a hearing on alleged misbehavior, by men other than the accusers, who hear both sides of the case; a psychiatric evaluation, by a professional in accord with professional standards.

In many cases no factual inquiry of any sort seems to be needed, since the identification and actions of an accused student are not disputed by him. To insure that the absence of challenge by the student actually represents confirmation by him of the university's version of the incident in question, however, a court might require that he be allowed counsel by some mature advisor—whether teacher, parent, or lawyer—before a waiver of the appropriateness of factual inquiry is accepted as final. The mere facts as to the specific incident authorizing sanction, moreover, are not the sole objects of consideration by the school authorities. All matters pertinent to the decision on sanction or treatment should also, of course, be considered before decision is made, and the student and his adviser should be allowed to insure that the absence of a hearing as to

the specific incident does not lead to the use of unreliable collateral information, or the ignoring of relevant data in the subsequent decision on treatment or punishment.

If the procedure is based on diagnosis and treatment, only the professional standards of appropriate therapeutic roles should be enforced by courts on the school disciplinary procedures,[188] to encourage university autonomy in choosing among such appropriate professional procedures.[189] The usual benefits of charges and adversary hearing bear little relevance to a therapeutic relationship. Nor does the principle that deprivations may not be imposed on one who has not committed a violation of regulations. The student's freedom may, of course, be greatly infringed by the school's involvement with intimate personality or behavior problems, but the school's action may be permitted by the court because it constitutes desirable educational guidance. The minimum judicially enforceable standards for protection of the interests of one involved in a process of counseling and rehabilitation would seem to be that the treated person voluntarily involves himself in the therapeutic relationship, that the decisions on treatment be made by qualified personnel, that they base their decisions on information accepted in their profession as adequate, and that the treatment be within the accepted techniques of the profession. These standards would reject as unreasonable, for example, punishment inflicted by untrained persons in the guise of treatment, or for reasons other than the student's welfare, or using palpably unacceptable techniques of control.

Concern with preventing individual arbitrariness might lead a court to require some sort of review "on the merits" of deprivations inflicted in the name of diagnosis and therapy. Were a college or group of colleges to set up an outside review panel of the sort used by some medical associations to review malpractice claims, no other court supervision would be needed.[190] A court might well encourage such professional review rather than a conflict-oriented system of

188. Thus, under these standards, when school discipline is employed for moral education or psychological rehabilitation, the university would be allowed to utilize reports of specific incidents of rule violations to give it clues as to which students require special guidance. And after a student had been called to the attention of the school authorities, they could also, without violating the criterion of "reasonableness," use interviews and the reports of persons with close personal knowledge of the student—other students, counselors, teachers, and family—as well as such available data as records of psychological examinations the student had taken, academic records, memoranda of past interviews with the student, and the like. Even were the student found not to have committed the recent behavior charged against him, the therapist's decision on a review of all the information that the student has a need for special treatment—even involving withdrawal from school —would not be condemnable as unreasonable deprivation.

189. For one possible form of a disciplinary system with nonpunitive orientation, see generally WILLIAMSON & FOLEY, COUNSELING AND DISCIPLINE (1949).

190. Committee A of the American Association of University Professors has played a somewhat similar role in investigating alleged violations of academic freedom to determine whether faculty dismissals were for acceptable cause or were violations of professional standards. And student officials of the U.S. National Student Association, on invitation of a college's administration, student government, or student body, will investigate and report on alleged school violation of student's rights.

punishment and appeal, because it would emphasize the shared interests of school, student, and court in the proper treatment of the student. An organization, or an *ad hoc* committee, selected by a school, would likely be an impartial and skilled review board. Certainly if it were accepted by both school and student, a court should grant to the decisions of such a group at least the respect given to the decisions of commercial arbitrators, rather than itself attempting review on the substance.

In a procedure looking towards ultimate imposition of punishment for specific offenses, on the other hand, procedures designed to produce reliable factual information are requisite.[191] In defining the minimum content of such a standard, a court has in its own experience resources superior to the schools. Drawing upon the lessons of this experience, a court might well choose the following principles as minimum procedural standards for university discipline, to insure fair and reliable fact-finding.[192] The decision is to be made by some impartial tribunal, deciding only on the basis of evidence heard by it during its hearings. To allow him to prepare a defense, the student should be given notice of the hearings, sufficient time, a specific statement of charges, and warning of the serious consequences that might ensue. Because of his unequal position the student should be allowed counsel—parent, friend, lawyer, or faculty member of his choice. So that the panel might hear both sides of the matter, the student should be allowed to present evidence and utilize the compulsion of school authority to summon students or staff as witnesses. To expose fraud, mistake, half-truth or conspiracy, the student should know the evidence against him, know the names of the persons giving it, be given a chance to rebut it, and be allowed to cross-examine adverse witnesses. As a final guarantee of reasoned decision, the tribunal should make specific findings of fact and recommended conclusions, to which the student should have the opportunity to prepare objections, before review by the highest school authorities. The exclusionary rules employed in courts of law might be abandoned by the school tribunal in favor of admitting improperly obtained evidence and procuring the punishment of whatever school official obtained it; the formal evidentiary rules could be replaced by everyday notions of relevance and reliability. Neither of these elements of court procedure are required by the fact-finding function of the school tribunal. Nor would use of a jury be demanded by the dictates of reliable fact-finding. The hearing need not be public if the student involved prefers privacy.[193]

191. As an alternative, the court could itself conduct *de novo* hearings on the ultimate issue. See White v. Portia Law School, 274 Mass. 162, 174 N.E. 187 (1931), *cert. denied*, 288 U.S. 611 (1932) (court-appointed master found facts as to student misbehavior which led to expulsion; on the basis of his finding, court determined the expulsion to be justifiable).

192. See note 13 *supra*.

193. It would be an absurdity to proscribe a public hearing in the case of a delinquent child on the one hand, and on the other to require it where a child merely infracted a school rule, subjecting such child to all the attendant, deleterious effects which trained observors have discovered usually follow such hearings.
Mando v. Wesleyville School Dist., 81 Pa. D. & C. 125, 128 (1952).

However, the maxim that "not only must justice be done, it must be made to appear to be done," generally-accepted notions of fair play, and recognition that students share with faculty and administration a concern with the best interests of the school, would suggest that responsible students be included as part of the school adjudicating process.[194]

Finally, a third factor for the court to weigh, in addition to the nature of the facts to be found and the suitability of the inquiry for finding them, is whether the procedure followed corresponded in care to the importance of the matter decided. Contestation of allegations of historical fact, the resolution of which will determine an expulsion, is a serious matter which should receive full and serious consideration—more expenditure of care and deliberation than an uncontested matter or a lesser sanction would require. And expulsion from a professional school, or expulsion with notation of dishonorable character, or other sanctions especially likely to cut off the student's chances for continuation of similar education and work elsewhere, are even more serious than ordinary expulsions and would require even higher standards of care in deliberation before imposition.

CONCLUSION: ANALYSIS ON AN INSTITUTIONAL BASIS

The factors discussed above as relevant to procedural and substantive standards do not mention any distinction between "state" and "private" colleges. To some this may seem strange. The distinction between the two is common to everyday language, and has long been assumed by the courts. And the characterization of an institution as "state" has been useful in extending constitutional protections to persons affected by actions of other than the traditional executive, legislative and judicial actors. But the standards here developed are based on the natures of universities and their students—and a school is as much a school whether it be named "state" or not.[195] State schools today do not differ as a class from private schools in terms of size, organization, purpose, quality, or other relevant factors. Those differences which do exist are few, and of little functional importance. One is that state schools generally do not find their major source of income in endowment revenues and student fees, but in annual grants from a single institutional donor—which is the state legislature. A second is that the institutional founder of the state university has shaped its purposes—often historically, that it emphasize agriculture and mechanical arts and universally even today, that it be secular. A third is that—for most of those state schools not established by state constitution as a "fourth" and independent branch of government—the university board is subject to some degree of con-

194. While consideration of the values of an honor system are beyond the scope of this Comment, to the extent that such systems are relied upon to find the facts of alleged rule violations they fall within the analysis here presented. The special characteristics of an honor system can not substitute for the protections of due process, but a university might provide these protections through such a format.

195. See generally THE COMMITTEE ON GOVERNMENT AND HIGHER EDUCATION, THE EFFICIENCY OF FREEDOM (1959).

trol by a higher board, the legislature. But these differences between state and private universities are of degree and not of kind. They do not alter the task of weighing competing school and student interests which is necessary to provide content for the standard of reasonableness by which to judge expulsion. The same set of factors which determine that standard in the public college situation are at work also in the private. The result reached by weighing the factors will, of course, vary with the specific purposes, procedures, alternatives, costs, and goals involved in each expulsion. A state school, equally with a private school, should not be made to follow the rigid formalities or stereotyped doctrines sometimes used for testing the propriety of actions of courts and other agencies of state government. But the value placed by society on accuracy in fact-finding before punishment, on fairness, on freedom for the individual, applies as strongly to the private college student as to his brother at a state school. The value placed by society on the academic freedom and institutional autonomy of the university faculty should be accepted as applying to the state school equally with the private.[196] To the extent that a school—state or private—is functionally a government, our social values demand that standards be imposed on the discretion of administrators—state or private—to protect justice and liberty in the school community.

196. Our view is that in a democracy, all advance censorship, except that demanded by law and enforced in the courts (such as prosecutions of clearly obscene material) should be resisted with vigilance. . . .

We believe that this *applies to all* institutions of higher education, as well as to democracy generally, *and especially to public* institutions supported by public funds . . . .

All these restrictions [censorship of student political groups, political speakers, and writings on controversial subjects] defeat academic freedom. *They also effectively defeat the freedoms of speech and assembly.* . . .

Report, Committee on Civil Rights, New York County Lawyer's Association, 1962, under the chairmanship of Whitney North Seymour, Jr., former President of the American Bar Association. (Emphasis added.)